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No. 385

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SHIP "JOSEPH P. THOMAS," SAMUEL WATTS, ET AL., CLAIMANTS,
Appellants,

vs.

JENS P. JENSEN,
Appellee.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States, Northern District of California.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

SHIP "JOSEPH B. THOMAS,"
SAMUEL WATTS, et al., Claimants,
Appellants,
vs.
JENS P. JENSEN,
Appellee.
No. 385.

Stipulation as to Printing.

It is hereby stipulated that in printing the transcript on appeal in the above entitled cause, the following portions of the original transcript on file herein may be omitted:

On page 5 the application and affidavit of the libelant for juratory caution and order thereon may be omitted.

On page 7 the juratory caution entered into by the libelant may be omitted.

On page 15 the order for proclamation and the proclamation may be omitted.

On page 16 omit all introductory matter down to the words "answer of Samuel Watts and others," and in lieu thereof substitute "Style of court and title of cause."

On page 20 omit all introductory matter before the words "Libelant's proofs," and substitute therefor "Style of Court and title of cause."

On page 20, after the words "Libelant's proofs," omit all introductory matter down to the paragraph beginning with "It is agreed that the testimony of the witnesses shall be taken stenographically," etc.

On page 89 omit all introductory matter down to the name "Edward Peterson," and prefix to said name the words, "Deposition of."

On page 104 prefix to the words "Henry Hannun, called for claimant," the words "Deposition of."

On page 112 omit all introductory matter down to the words "Style of court and title of cause."

On pages 127 and 128 omit the notarial certificate.

On page 129 omit the motion and order made on the 18th day of September, 1893, to submit cause on briefs to be filed.

On page 130 omit the motion and order made on the 26th day of September, 1893, to vacate the order submitting the cause on briefs and that the cause be re-opened to take further testimony.

On page 131 omit the stipulation and order made and entered on the 26th day of September, 1894, that the cause be submitted on briefs to be filed.

On page 156 omit the unnecessary formal order entered by the clerk that the libelant recover six thousand dollars gross damages, etc., as this fully appears in the opinion

of the Court and in the final decree entered in accordance therewith.

On page 159 omit the libelant's bill of costs as taxed and filed June 3d, 1897.

On page 160 omit the commissioner's costs as taxed and filed on the 3d day of June, 1897.

On page 161 omit the clerk's costs as taxed and filed on the 3d day of June, 1897.

FRANK P. PRICHARD.
Proctor for Appellee.

ANDROS & FRANK,
Proctors for Appellants.

[Endorsed]: Filed July 27, 1897. F. D. Monckton, Clerk.

Citation.

UNITED STATES OF AMERICA, ss.

The President of the United States, to Jens P. Jensen, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the ninth day of July, 1897, pursuant to an order allowing an appeal duly entered and of record in the clerk's office of the District Court of the

United States, for the Northern District of California, wherein Samuel Watts and others are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable THOMAS P. HAWLEY, Judge of the United States District Court for the District of Nevada, presiding, this 10th day of June, A. D. 1897.

THOMAS P. HAWLEY,
Judge.

Service of a copy of the within citation acknowledged this 16 day of June, 1897.

JENS P. JENSEN. his X. mark.

FRANK PRICHARD,
Proctor for Libelant.

[Endorsed]: Filed June 25th, 1897. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,

vs.

THE SHIP "JOSEPH B. THOMAS," her tackle, apparel and furniture,
Respondent.

Libel.

To the Honorable WILLIAM W. MORROW, Judge of the District Court of the United States, in and for the Northern District of California, sitting in Admiralty:

The Libel and Complaint of Jens P. Jensen, of Philadelphia, against the American ship "Joseph B. Thomas," whereof W. J. Lermond, of Thomaston, Maine, now is or late was master, against the said ship, her tackle, apparel and furniture, and against all persons lawfully intervening for their interests therein in a cause of damage for a personal damage, civil and maritime, showeth:

I.

On April 11th, 1892, the said ship "Joseph B. Thomas" was lying in the river Delaware, alongside of Race street wharf, at the port of Philadelphia, and was being loaded by a stevedore, who had under a contract undertaken to load her cargo. The libelant, who resides at 53 Prime street, in the city of Philadelphia, was a laborer in the employ of said stevedore, and on said last mentioned date, was in the hold of the said ship with the knowledge and permission of the master lawfully engaged as one of the employees of said stevedore in the said work of loading the cargo of said ship.

II.

Between three and four o'clock in the afternoon of the said day, while libelant was lawfully at work in the hold of the said vessel, with the knowledge and permission of the master as aforesaid, a barrel fell through the hatchway of the said vessel down into the hold where the libellant was working, striking him on the head.

III.

The said barrel fell down the said hatchway and upon the libelant as aforesaid in consequence of the negligence of the master of said vessel and of those entrusted by the

owners of the said vessel with the care and management of said vessel.

IV.

By reason of the fall of said barrel upon the libelant as aforesaid, the libelant's skull was fractured, and he sustained such severe injuries, that he was confined in hospital for fifteen weeks, during which time two operations were performed upon him, and he endured very great pain and suffering. By reason of said injury his right side was, and continued to be, paralyzed. Libelant has been unable by reason of his injuries as aforesaid, to perform any work, or earn any wages, and in addition to the pain and suffering, which he has undergone, he has had his earning capacity destroyed, and has sustained permanent injuries to his health and body of the most serious character. Libelant has been damaged thereby and in consequence of the said fall of said barrel and of said injuries in the sum of ten thousand dollars.

V.

That the said ship is an American vessel and is now in the port of San Francisco within the Northern District of California.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process of attachment in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said ship "Joseph B. Thomas," her tackle, apparel and furniture and that the said W. J. Lermond, master, and all other persons having or pretending to have any right, title or interest therein, may be cited to appear and answer all and singular the matters so articulately propounded. And that this Honorable Court will pronounce for the damages aforesaid, with interest and costs, and that the said vessel may be condemned and sold to pay the same, and that the Court will grant to libelant such other and further relief, as in law and justice he may be entitled to receive.

his
JENS P. (X) JENSEN.
mark.

Jens P. Jensen, being unable to write, signed and subscribed the foregoing instrument in my presence by making his mark thereto, and at his request and in his presence I have written his name near his said mark and hereto subscribed my own name as a witness thereto.

[Seal] WM. W. CRAIG,
U. S. Commissioner, East Dist. of Penna., Phila., Pa.

Sworn and subscribed to before me this twenty-eighth day of September, 1892, by the said Jens P. Jensen.

[Seal] WM. W. CRAIG,
U. S. Commissioner, East Dist. of Penna., Phila., Pa.

WALTER G. HOLMES,
Proctor for Libelant.

[Endorsed]: Filed Oct. 10th, 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

[Style of Court—Title and Number of Cause.]

Claim.

To the Honorable WILLIAM W. MORROW, Judge of the District Court of the United States for the Northern District of California.

The claim of Samuel Watts, Alfred Watts, N. J. Meehan, W. M. Hyler, S. B. Starrett, W. J. Lermond, Elizabeth N. Miller, George K. Washburn, Charles H. Washburn, Helen A. Anderson, John N. Brown, Clarence D. Payson, Halver Hyler, Jane G. Fish, John T. Berry, C. W. Lewis, Wm. M. F. Hall, S. C. Jordan, J. B. Thomas, F. L. Richardson, Ambrose Snow, C. C. Black and J. F. Chapman, to the ship J. B. Thomas, her tackle, apparel and furniture, now in the custody of the marshal of the United States for the said Northern District of California, at the suit of Jens P. Jensen, alleges—

That they are the true and bona fide owners of the said ship, her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, these claimants pray that this Honorable Court will be pleased to decree a restitution of the same to them, and otherwise right and justice to administer in the premises.

J. F. CHAPMAN,
For Ship and Co-Owners.
ANDROS & FRANK,
Proctors for Claimant.

Northern District of California—ss.

Sworn to before me this 11th day of Oct., A. D. 1892.

JOHN FOUGA,
Comm'r. U. S. Circuit Ct. Nor. Dist. Cal.

[Endorsed]: Filed Oct. 11th, A. D. 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

Stipulation for Costs.

Whereas, a libel was filed in this Court on the 10th day of Oct. in the year of our Lord one thousand eight hundred and ninety-two, by Jens P. Jensen against the ship "Joseph B. Thomas," etc., for reasons and causes in the said libel mentioned, and whereas said ship "Joseph B. Thomas," etc., has been claimed by Samuel Watts et al., and the said Sam'l Watts et al., and J. G. Levensaler &

J. M. Josselyn, his sureties, parties hereto, hereby consenting and agreeing that in case of default of contumacy on the part of the said claimants or his sureties, execution may issue against their goods, chattels and land for the sum of five hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars, conditioned the claimants above named pay all costs and charges that may be awarded against them in any decree by this Court, or, in case of appeal, by the appellate court.

J. F. CHAPMAN,
For Self and Co-Owners,
G. M. JOSSELYN,
J. G. LEVENSALER.

Taken and acknowledged this 11th day of Oct., 1892, before me.

JOHN FOUGA,
Commissioner United States Circuit Court, Northern District of California.

Northern District of California—ss.

J. G. Levensaler and G. M. Josselyn, parties to the above stipulation, being duly sworn, do depose and say, each for himself that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

G. M. JOSSELYN,
J. G. LEVENSALER.

Sworn to before me this 11th day of Oct., 1892, before me.

JOHN FOUGA,

Commissioner United States Circuit Court, Northern District of California.

Filed the 11th day of Oct., 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the U. S. District Court, Northern District of California.

IN ADMIRALTY.

JENS JENSEN,

vs.

SHIP "J. B. THOMAS," etc.
SAMUEL WATTS et al., Claimants.

Stipulation for Discharge.

It is hereby stipulated that the above named ship may be discharged from arrest in the above entitled action on the claimant giving an admiralty stipulation in the sum of ten thousand dollars, with G. M. Josselyn and Joseph G. Levenseller as sureties.

WALTER G. HOLMES,
Proctor for Libelant.

[Endorsed]: Filed October 11th, 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

No. 1042.

Stipulation.

Stipulation entered into pursuant to the rules of practice of this Court.

Whereas, a libel was filed on the 10th day of Oct., in the year of our Lord one thousand eight hundred and ninety-two by Jens P. Jensen against the ship "Joseph B. Thomas" etc., for the reasons in the said libel mentioned; and whereas, the said ship "Joseph B. Thomas" etc., is now in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas the said ship "Joseph B. Thomas" etc., has been claimed by Sam'l Watts et al.; and whereas, it has been stipulated that said ship "Joseph B. Thomas" etc., may be released from arrest upon the giving and filing of an admiralty stipulation in the sum of ten thousand ($10,000), as appears from said stipulation on file file in said Court; and the parties thereto consenting and agreeing that, in case of default or contumacy on the part of the claimants or their sureties, execution for the above amount may issue against their goods, chattels and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall, at any time, upon the interlocutory or final order or decree of the said District Court, or of any appellate court to which the

above named suit may proceed, and upon notice of such order or decree to Andros & Frank, Esquires, proctors for the claimant of said ship "Joseph B. Thomas" etc., abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

J. F. CHAPMAN,
For Self and Co-Owners,
G. M. JOSSELYN,
J. G. LEVENSALER.

Taken and acknowledged this 11th day of October, 1892, before me.

JOHN FOUGA,
Commissioner United States Circuit Court, Northern District of California.

Northern District of California—ss.

J. G. Levensaler and G. M. Josselyn, parties to the above stipulation, being duly sworn, depose and say, each for himself, that he is worth the sum of ten thousand ($10,000) dollars over and above all his just debts and liabilities.

G. M. JOSSELYN,
J. G. LEVENSALER.

Sworn to this 11th day Oct., 1892, before me.

JOHN FOUGA,
Commissioner United States Circuit Court, Northern District of California.

Filed the 11th day of Oct., 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk

Monition.

NORTHERN DISTRICT OF CALIFORNIA—ss.

The President of the United States of America, to the (Seal) marshal of the United States for the Northern District of California, Greeting:

Whereas, a libel hath been filed in the District Court of the United States for the Northern District of California, on the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-two. By Jens P. Jensen against the ship "Joseph B. Thomas," her tackle, apparel and furniture, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant. You are therefore hereby commanded to attach the said vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the North-

ern District of California, on the 25th day of October, A. D. 1892, at eleven o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Hon. WM. W. MORROW, Judge of said Court, at the city of San Francisco, in the Northern District of California, this 10th day of October, in the year of our Lord, one thousand eight hundred and ninety-two, and of our Independence the one hundred and seventeenth.

SOUTHARD HOFFMAN,
Clerk.
By J. S. Manley, Deputy Clerk.

WALTER G. HOLMES, Esqr.,
Proctor for Libelant.

Marshal's Return.

In obedience to the within monition, I attached the ship "Jos. B. Thomas" therein described, on the 10th day of October, 189—, and have given due notice to all persons claiming the same that this Court will, on the 25 day of October (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial

and condemnation thereof, should no claim be interposed for the same.

San Francisco, Cal., Oct. 11, 1892.

W. G. LONG,
United States Marshal.
By F. L. Morehouse, Deputy.

[Endorsed]: Monition returnable Oct. 25th, 1892. Walter G. Holmes, Proctor for Libelant. Issued Oct. 10th, 1892. Filed October 25th, 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

[Style of Court and Title of Cause.]

Answer.

The answer of Samuel Watts, Alfred Watts, N. C. Mehan, W. M. Hyler, S. B. Starrett, W. J. Lermond, E. N. Miller, C. K. Washburn, C. H. Washburn, H. A. Anderson, J. N. Brown, C. D. Payson, H. Hyler, J. G. Fish, J. T. Berry, C. W. Lewis, Wm. F. Hall, S. C. Jordan, J. B. Thomas, F. L. Richardson, Ambros Snow, J. S. Burgess, C. C. Black and J. F. Chapman, to the libel of Jens P. Jensen, against the ship "J. B. Thomas," her tackle, apparel and furniture, and against all person lawfully intervening for their interest therein in a cause of damage, civil and maritime, alleges:

I.

Answering unto the first article in said libel, these claimants admit the allegations therein, except they deny that said libelant was on board of said ship with the knowledge or permission of the master thereof, but they admit that the libelant was on board said ship with the knowledge and permission of the second officer of said ship, who was then and there in charge there.

II.

Answering unto the second article in said libel, these claimants, on information and belief, deny that said or any barrel fell through the hatch of said ship into the hold thereof, and struck said libelant on the head, or struck him at all, or that any barrel fell through the hatch of said ship.

III.

Answering unto the third article in said libel, these claimants deny that any barrel fell down said hatch upon said libelant in consequence of the negligence of the master of said vessel, or of the negligence of those or any of those entrusted by the owner of said vessel with the care and management of the same, or that any barrel whatsoever fell down said hatch upon said libelant or at all.

IV.

Answering unto the fourth article in said libel, these claimants deny that by reason of the supposed fall of any barrel upon the said libelant his skull was fractured, or that he sustained any injuries whatsoever, or that any barrel fell upon him or struck or injured him at all.

V.

Further answering unto said libel these claimants, on information and belief, aver the truth and fact to be: That the said libelant was one of several laborers employed by a stevedore who had contracted with the owners of said vessel or their agents to load the same. That it was the duty of and was usual and customary among laborers employed by stevedores to load and unload vessels at the port of Philadelphia to take off and put on, as occasion might require, the covers of the hatches of such vessels while being loaded. That the said laborers, among whom was the said libelant, on the morning of the day on which the accident to the said libelant occurred, took off the hatch covers of the fore hatch and negligently and carelessly piled them up forward of the head ledge or forward combing of said hatch. That a small empty keg had been placed by someone on the end of one of these hatch covers, but by whom the same was done these claimants are ignorant, so that they can make no

averment in respect to the same. That one of the said laborers, a coservant with the said libelant, trod upon or otherwise negligently interfered with said hatch covers, by reason of which and also in consequence of the improper and negligent manner in which they had been placed in the position in which they were by some of the said laborers, coservants of said libelant, they tipped and precipitated said keg into the hold of said vessel, by reason thereof the said libelant was by the same struck and injured; that the accident and injury to the libelant was occasioned and brought about solely in consequence and by reason of the negligence of the coservants of said libelant or some of them, and not by reason of any supposed negligence of these claimants or any of them, or that of their servants or any of them. But whether said libelant, as in the fourth article of said libel is alleged, was confined to the hospital for fifteen weeks, or for what length of time he was confined to the hospital, or whether during the time that he was in said hospital he had two or any operations performed on him, or whether he endured very great pain or suffering, or whether by reason of said injury his right or any side was paralyzed, or if paralyzed, continued to be paralyzed, or that by reason of any of the aforesaid alleged injuries libelant has been unable to perform any work or to earn any wages, or whether he has had his earning capacity destroyed, or has sustained permanent injury to his health or body of a most serious or other character, these claimants are ignorant, so that they can neither admit nor deny the same, or any of them, wherefore they call for proof of each and every of said allegations.

VI.

These claimants further, on information and belief, deny that in consequence of the supposed fall of said supposed barrel or at all, the said libelant has sustained damages in the sum of ten thousand dollars, or in any sum whatsoever.

VII.

Answering unto the fifth article in said libel, these claimants admit the allegations therein.

VIII.

Answering unto the sixth article in said libel, these claimants admit that the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but they deny that all and singular the same are true.

Wherefore, these claimants pray that said libel be dismissed.

J. F. CHAPMAN,
For Self and Co-Owners.

ANDROS & FRANK,
Proctors for Claimants.

Sworn to before me, this 3rd day of November, 1892.

[Seal] GEO. T. KNOX,
Notary Public.

[Endorsed]: Filed November 3rd, 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,

vs.

THE SHIP "JOSEPH B. THOMAS." } No. 10,452.

Testimony.

It is agreed that the testimony of the witnesses shall be taken stenographically and signatures waived, counsel to be furnished with copies of the testimony.

Dr. EDWARD C. ELLETT, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. What is your occupation?

A. I am a physician and a graduate of the University of Pennsylvania.

Q. In April, 1892, you were connected with what institution?

A. St. Agnes Hospital, Philadelphia.

Q. Please state in your own way what you know of the case of Jens P. Jensen.

A. On the 11th of April, 1892, he came to the hospital.

He was brought there by the police patrol, if I remember rightly, and said that while working on the vessel he had received an injury by a water bucket or a water barrel or something of the sort falling and striking him on the head. The notes of the case are as follows:

"E. P. Jensen, 31, Denmark. (Chas. Davis, Old Navy Yard.) 4, 11, '92. While at work on the wharf loading a vessel, a water barrel fell thirty feet clear, the rim striking him on the left parietal region, inflicting a wound extending in an antero-posterior direction about three inches long, and producing a compound comminuted fracture of the skull, with depression. He was conscious and walked into the house. No paralysis anywhere; sensation unimpaired. As the symptoms were not urgent, the wound was packed, after cleansing with C. H. I 3 gauze, a few vessels tied, and a wet 1-5000 compress applied.

"4, 12, '92. Operation at 12 M. Anasthesia by mixture of C (3) and E (6) by Dr. Kelly. Incision prolonged, and loose fragments separated and removed. Lacerated wound of dura, exposing cortex lacerated slightly. Horse hair drainage. Wound closed with silver wire, and A. D. Reacted well.

"4, 14, '92. Very dull. Speech inarticulate.

"4, 16, '92. Epileptiform convulsions at 9 A. M., only affecting head and neck. Both sterno-cleido mastoids affected, the left more than the right. The right side of the face much more affected than the left. The movements consisted in clonic spasms of face and neck, the mouth being drawn much to the right. Frothing at the mouth. Lasted about two and a half minutes. Appar-

ently consciousness was not lost, as he made several deliberate voluntary motions with the hands during the convulsion. At its completion, he lapsed into his former dull condition. Says he never had a similar attack.

"4, 16, '92. Noticed a paralysis of right side of face and right arm. Wound dressed; suppurating. In the median line, about the position of the lambda, a depressed area about the size of a half dollar was noticed, probably old, though the patient says he knows of no previous injury to head.

"4, 18, '92. No more convulsions. Palsy of face a little better. Arm same as before. Seems a little less dull.

"4, 19, '92. Some improvement in mental condition. Paralysis same. Dressed; stitches removed. On syringing wound, particles of what was apparently disintegrated cerebral substance came away. A probe passed downwards easily to a depth of two and a half inches.

"4, 21, '92. Legs all right, as to motion. Dressed.

"4, 22, '92. Motion almost abolished in right leg.

"4, 23, '92. Profuse purging. Dressed. A mass of cortical matter (apparently) bulging at center of wound, which is open. Expression is bright, though speech still inarticulate. Paralysis as above.

"4, 27, '92. Dressed.

"4, 28, '92. Speech a little better. A friend states that when a boy he fell and hurt the back of his head."

I went off at the hospital on the 1st of May, and the next note was made by Dr. Davisson.

Q. What was the nature of the operation which you performed?

A. There was considerable injury to the bones of the head; they were broken and driven down below the level of the other bones, and were producing pressure on the brain. The operation consisted of liberating and removing those fragments.

Q. At the time you last ceased to attend him, what was his then condition?

A. He was confined to bed; he could not stand; he was mentally dull, and had paralysis of one side of the face; I think it was the right. It is stated in the notes. Also his right arm and leg, if I remember rightly; he could not lift his arm from the bed at all. He had some power in his leg, but not enough to raise it right straight up off the bed, and on account of the paralysis of his face his speech was quite indistinct.

Cross-Examination.

By MR. EDMUNDS.

Q. When did you graduate? A. In May, 1891.

Q. This was in April, 1892?

A. Yes, sir.

Q. So that you had graduated about a year?

A. Yes, sir.

Q. Did anybody help you with this operation?

A. Yes, sir; I only assisted. The surgical chief at the time, Dr. J. Ewing Mears, did the operation; his address is 1429 Walnut Street, Philadelphia.

Q. Is he here today? A. No, sir.

Q. You were simply assisting?

A. Yes, sir.

Q. Why did you make these inquiries with reference to old injuries?

A. At the date it is noted in those notes we discovered that he had a depression in the skull considerably further back than the site of the injury, and we thought it possible, though not probable, that it had been inflicted at the same time the other was. I inquired to see if he had ever hurt his head before.

Q. You found that he had? A. Yes.

Q. Were you not also surprised with his condition subsequent to the operation?

A. No, sir.

Q. Did you expect, before you made the operation, that his condition would probably be as you found it after you made the operation—did you expect paralysis and convulsions?

A. Well, we were not surprised to find them.

Q. Why then did you not make the operation the day before?

A. Because his condition was not urgent enough to demand it.

Q. That is, you thought the day he came there that there was nothing very serious the matter with him?

A. We knew the extent of the injury, but he was in no immediate danger of dying, and we did not think that a few hours more or less would make any difference. The wound was cleaned up and a temporary dressing applied right away. He came in, if I remember rightly, on the afternoon of the 11th and was operated on about noon of the 12th.

Q. Then for nearly twenty-four hours nothing was done with him except to put an ordinary clean dressing on the wound? A. No sir.

Q. You thought that was sufficient at the time?

A. Yes, sir.

Q. Have you made an examination of him lately?

A. No, sir; not since the 1st of May, 1892.

Q. What was his condition on the 1st of May?

A. I have just stated it to Mr. Prichard. That was his condition when I stopped seeing him.

Redirect Examination.

By MR. PRICHARD.—Q. Was the nature of the injury such that this delay from the afternoon of the 11th to noon of the 12th in any way aggravated the result?

A. We did not think so; no, sir.

By MR. EDMUNDS.—Q. Still if you had known that the man was likely to have convulsions, you would have looked after him a little more carefully, I suppose, would you not? A. No sir.

By MR. PRICHARD.—Q. Would it make any difference, as to the liability as to convulsions whether you performed the operation at once or, the next day?

A. Well, we did not think it would at the time make any difference as to his subsequent condition.

Q. Do you think so now?

A. No, sir; I do not think it would.

By MR. EDMUNDS.—Q. You thought these convulsions might be anticipated, did you?

A. Yes, sir; they are not unusual in such cases.

Dr. ALEXANDER HERON DAVIDSON, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. What is your profession?

A. I am a physician and graduated at the University of Pennsylvania May 6th, 1892.

Q. Did you succeed Dr. Ellett at St. Agnes' Hospital?

A. I went on duty in the surgical wards after he left.

Q. State your knowledge of the case of Jensen from the time you took charge of it.

A. When I found him he was in bed, and had paralysis of the right side of the body—the right side of the face, the right arm, and the right leg. He could not put out his tongue. He could not raise his arm, of course.

Q. Have you a copy of the notes which you made?

A. I have; this copy is all in my handwriting.

Q. Is that all there is on the record?

A. Yes, sir; this was copied to give to a person who wanted to know about the case—a man who wanted the whole case simply for medical interest; I copied it all off afterwards; part of the handwriting is Dr. Ellett's and part mine in the history sheet. As I say, this was on the 3d of May. My notes on the subject are as follows:—

"5, 3, '92. Dressed. Paralysis of right side of body and right side of face. Dressed every other day.

"5, 9, '92. Part of horse hair drainage removed. Is getting the use of right arm and leg slightly; is able to close both eyes, and can protrude tongue slightly.

"5, 11, '92. Motion in arm and leg returning.

"5, 12, '92. Dressed. Horse hair removed.

"5, 18, '92. With assistance, patient walked a short distance.

"5, 19, '92 Dressed. Could be understood, being able to talk comparatively clearly, but slowly. Hernia of brain much less.

"5, 21, '92. More motion in arm. Talks more clearly. Hernia less. Wound clean and healing over.

"5, 23, '92. Dressed. Brain below level of cranial bones.

"6, 10, '92. Patient had two attacks of convulsive twitchings on right side of face.

"6, 25, '92. Wound almost healed, but two openings, one about two and a half inches long, the other about one-quarter of an inch long remaining.

"7, 1, '92. A small spicule of bone extruded from larger opening.

"7, 5, '92. A small spicule of bone found in dressing. But one opening remains. Interrupted current applied to arm daily.

"7, 15, '92. Discharged. Wound entirely healed over, though there is still the depression running in an antero-posterior direction. Power in arm good; fingers, however, weak. Leg good. Speech slow but intelligible. Some paralysis of right side of face. To come back daily for battery."

Q. At the time that he was discharged from the hospital, what was his condition, so far as capacity for manual labor went?

A. He was not in any condition for manual labor; he couldn't use his right hand or arm to any extent. He could raise it up, but he hadn't power in it. I believe he had not more power in it than to sufficiently comb his hair, if I remember right.

Q. Are you able to say what the probabilities are of the complete recovery of this man?

A. No, sir; it would be merely a personal opinion.

Q. I suppose that is a matter that can only be determined by time?

A. Yes, sir; I could not say how much more he will recover than he has since the 1st of May.

Cross-Examination.

By MR. EDMUNDS.—Q. When did you see him last?

A. When he served a subpoena on me about three weeks ago.

Q. How long before that was it that he left the institution?

A. He was around the institution, I think, about a month before that. He was discharged from the institution on the 15th of June, or the 17th of June, which ever it is on the record. He came around at one time after that and said he was coming to say that he might need us in court, I think. He used to come around to see some of the other patients; he was discharged, however, on the 15th.

Q. Did he say what he was doing when he came around there?

A. No, sir; I asked him how he was getting along, and he said he was pretty well, and showed me how he could use his arm and leg. I think I did ask him what he was doing, and he said "nothing." I won't swear to that.

Q. He said that he was getting along very well?

A. Well, yes, sir; to what he had been.

Q. That he was improving?

A. That he was about the same as he was when he left the hospital, improving slightly, perhaps.

Q. What did he say?

A. I don't remember what he said exactly; he said, in a sort of a way, "Oh, I am getting along fairly," something like that. He did not seem to be buoyed up.

Q. I did not ask you what he seemed; the question is what he said.

A. I can't remember exactly.

Q. What he did say left the impression on your mind that he was improving?

A. No; it didn't leave the impression on my mind that he was improving, no more than that he could walk around and had the use of his leg. Yes; a slight improvement in his arm, that is, an improvement all around.

Q. How old are you?

A. I will be twenty-four my next birthday, the 2d of October.

Q. When you took charge of this man you were not a physician; you graduated after you took charge of him?

A. Yes; I had not graduated then.

Q. Dr. Mears has charge down there, has he?

A. He is one of the surgical chiefs.

Q. He does not reside there, but simply visits?

A. Yes, sir.

Q. How often?

A. I never was under him, and I don't know how often he visits.

Q. Who were you under?

A. Dr. W. W. Kean, 1729 Chestnut, I think.

Q. How often did he come?

A. Whenever it was necessary; sometimes once a day; sometimes every other day, and other times, every two or three days, depending on what cases he had in the house, and whether he thought it was necessary to come down. If he had an operation one day and wanted to see the case the next day he would come down the next day.

Q. Did you notice the depression that this man had on the back of his head that the other physician spoke of?

A. No; I can't say that I did. I was principally interested in the location of the wound. As far as I recollect now, I don't remember having noticed the other depression—I might have seen it there and I might not.

Q. What do you think was the cause of these convulsive twitchings?

A. I don't know; it would be hard to say what was the cause of them. In my opinion they would be due to the injury.

Q. What makes you say that?

A. I think they were due to it.

Q. But what makes you say that?

A. They came on after he was injured. Then again,

there were little pieces of bone in the brain that might have set up this irritation and caused the convulsive twitchings. After they came out I never saw any more convulsive twitchings. They might have been due to that and they might not.

Q. If they were entirely removed the irritation would cease, wouldn't it?

A. If they were entirely removed irritation caused by them would cease.

Q. If a bone resting on the brain was removed and properly set there would be no pressure upon the brain at all would there?

A. What do you mean by properly set?

Q. Did you not remove the depression?

A. No, I had nothing to do with the depression.

Q. The bone that was broken was depressed and it was removed. A. Yes; I believe it was.

Q. So that the head resumed its rotundity?

A. Yes, sir; it afterwards resumed more than its rotundity.

Q. If it did that, the pressure was off the brain, wasn't it? A. Yes, sir.

Q. The pressure having been removed from the brain, of course the man, if he was a strong, healthy man, would naturally get well, wouldn't he?

A. Yes, sir; but I cannot say that the pressure was removed from the brain, if a couple of these spiculars of bone that had been driven in so that they couldn't be seen were there.

Q. You don't know that that was so?

A. No; but you asked me what I thought was the reason of the convulsions.

Q. I speak, however, after the bone came out, when you discharged him from the hospital—the bones of the skull and the pressure had been removed?

A. Yes, sir.

Q. So far as you know, all the pieces of bone had come out? A. Yes, sir.

Q. Therefore there was nothing to prevent at that time continuation of improvement? A. No, sir.

JOHN F. FITZGERALD, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. I am employed along the wharf by the Pennsylvania Railroad Company.

Q. On April 11th, 1892, what was your business?

A. The same.

Q. Were you on board the ship "Joseph B. Thomas" at the time Mr. Jens P. Jensen was injured?

A. Yes, sir.

Q. What were you doing?

A. Me and another young fellow went aboard to get a piece of rope.

Q. Where were you at the time of the accident?

A. Right standing over the hatch.

Q. Which hatch?

A. The ship's hatch.

Q. Please state in your own way what you saw of this accident.

A. The mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. It wasn't a barrel, it was a keg.

Q. Where was the keg standing at the time of the accident.

A. Right on the corner of the hatch. The hatches were taken off, and then put one on top of the other, and the keg set over, and when you tread on that corner of the hatch that turned the keg over and it rolled right down the hatch before anybody could get hold of it.

Q. Who was the young man that trod on the hatch?

A. A young man belonging to the ship.

Q. Do you know how long the barrel had been on the hatch? A. No, sir.

Q. On what part of the ship was the hatch?

A. Forward.

Q. How do you know this was the barrel that hit Mr. Jensen?

A. I saw it hit him. I hallooed to him to look out below, when it was falling—when it fell.

Q. Did you see it strike him? A. Yes, sir.

Q. Where did it strike him?

A. It hit him on the head.

Q. Who was O'Donnell that you speak of?

A. He was foreman for the stevedore.

Q. Do you know who else was on deck at the time this barrel fell?

A. Yes, sir;; I knew a young fellow by the name of William Gray.

Q. What was his business?

A. Working down at the wharf there, too.

Q. Did these hatch covers project over the hatch, or were they alongside of the hatch?

A. They were forward of the hatch. They were taken off.

Q. Did the ends of the hatch covers project over the hatch or not?

A. No, sir; forward of the hatch altogether.

Q. What part of the hatch covers did the barrel set on? How close to the hatch was the barrel?

A. That I couldn't say; I never measured those hatches, and I don't know how wide they were. I don't suppose they are more than about four feet anyhow, if they were that. The hatch coverings sat forward of the hatch, and this barrel was sitting on the port forward end of the hatch covering.

Q. Do you know the name of the mate of the ship who was trying to get up?

A. No, sir; I couldn't tell you; I don't know his name.

Cross-Examination.

By Mr. EDMUNDS.

Q. You are working for the Pennsylvania Railroad Company? A. Yes, sir.

Q. In what capacity?

A. Moving cars around, up and down from the ships.

Q. As a laborer? A. As a yard man.

Q. You had nothing to do with this ship?

A. No, sir; no more than getting cars set for the stevedore.

Q. Had you been on board of her before?

A. Yes, sir.

Q. Do you know her officers and crew?

A. She had no crew. When they are loading at the wharf they have no crew any more than the mate, boy, and a captain sometimes.

Q. You went aboard of her with somebody else to get a rope. A. Yes, sir.

Q. Where did you expect to get a piece of rope there?

A. From the mate.

Q. Did you see him and ask him for it?

A. Yes, sir.

Q. What were you going to do with it?

A. It was for this other young fellow, Gray.

Q. What did he want it for?

A. I couldn't tell you.

Q. Gray wasn't connected with the vessel?

A. We went aboard, the pair of us, and we asked the mate for this piece.

Q. What were you going to do with the rope?

A. I don't know what he wanted to use it for.

Q. What did Gray do?

A. He was a clerk for the Pennsylvania Railroad.

Q. Did you get the piece of rope?

A. No, sir; this man was hurt between the time. He wanted a piece of half-inch rope?

Q. Manilla rope? A. Yes, sir.

Q. What for? A. I couldn't say.

Q. How long a piece did he want?

A. He didn't mention the length, either, that I know of.

Q. You don't know what he was going to do with it?

A. No, sir.

Q. Did you happen to get on board there just as this accident occurred?

A. Yes, sir; it was through that that the accident occurred, I think—the mate coming up to get this piece of rope for this young man.

Q. You went right aboard, and went forward, you and Gray both?

A. We went right up forward. The ladder comes there.

Q. Did you go up on the forecastle hatch?

A. Yes sir.

Q. When you got there, did you stand there?

A. Yes, sir.

Q. Where was the mate?

A. Down between decks.

Q. That is, in the hold below? A. Yes, sir.

Q. There was a hatch right under you then, was there?

A. Yes, sir.

Q. Then the lower hold was below that?

A. Yes, sir.

Q. Men were working in the lower hold?

A. Yes, sir.

Q. The mate was standing alongside of the hatch opening, just below the forecastle head?

A. No, sir; he was in between decks.

Q. Do you know what a hatch combing is?

A. Yes, sir.

Q. This vessel had hatch combings around her hatchway, hadn't she? A. Yes, sir.

Q. The hatch covering was made out of what?

A. I didn't examine that.

Q. Do you know whether it was wood or iron?

A. It was wood.

Q. It was lifted off? A. Yes, sir.

Q. Put alongside of the hatch? A. Put forward.

Q. Was there more than one or two of them?

A. I think there was two or three of them.

Q. That is to say, the hatch covering over the hatch was in two or three pieces? A. Yes, sir.

Q. When they took it off they put it down alongside of the hatch forward? A. Yes, sir.

Q. And piled them on top of each other; is that right?

A. One was on top of the other. I couldn't say how many was there.

Q. They were forward of the hatch opening?

A. Yes, sir.

Q. But one part of them was lying alongside of the combing?

A. There was a hole, and the hatches were taken off and set forward.

Q. Alongside of the hatch?

A. Yes, sir.

Q. And the three hatch coverings, therefore, would come up a little higher than the combings?

A. They would come about even.

Q. This barrel or keg was set on the other end of the covering away from the hatch?

A. Yes, sir.

Q. The end away from the hatch?

A. Yes, sir.

Q. You say you went up there after this rope, you and Gray? A. Yes, sir.

Q. Who did you ask for it?

A. The mate.

Q. Where did you find the mate?

A. Down between decks.

Q. What did he say?

A. He said all right, that he would come up and get us a piece.

Q. To come up, he had to come from between decks up on top of the topgallant forecastle, didn't he?

A. Yes, sir; he had to get up there.

Q. How far is that—how high is that space?

A. I don't know; about five feet, I guess. It might have been more than that.

Q. He couldn't get up without assistance, you say?

A. No, sir; Mr. O'Donnell helped him up from below on to the between decks.

Q. Then some young fellow ran around there to help him up further?

A. Yes, sir; got him by the hand.

Q. And this young fellow who ran around you say was

the one that stepped on the hatch combing; is that right?

A. Yes, sir; on the hatch coverings.

Q. I suppose he could not get around there without stepping on them, could he, from where he was?

A. I don't know; I couldn't say anything about that.

Q. Where did you first see this young fellow that ran around and stepped on them?

A. I saw him when he came around.

Q. Did you ever see him before that?

A. Yes, sir; he belonged aboard the ship.

Q. Where did you ever see him before that?

A. On deck.

Q. When?

A. I couldn't tell you when; several times.

Q. What was he doing when you saw him?

A. He was coming around to help the mate; knocking around the deck and one thing and another. I couldn't say what he was doing.

Q. How old was he?

A. That I couldn't say; I don't know his age.

Q. Was he forty?

A. No; he couldn't be forty; he wasn't that old.

Q. Do you think he was thirty?

A. I couldn't say; I don't know his age.

Q. Was he between thirty and forty or twenty-five and forty?

A. He wasn't that. I don't know his age.

Q. Couldn't you tell us whether he was twenty-five?

A. No, sir; not men that knock around at sea.

Q. Was he a man?

A. He was a young man; yes, sir.

Q. Was he of age? A. I couldn't say.

Q. What do you think about it; can't you tell by a man's looks whether he is of age or not?

A. No; I couldn't. Many a man is deceiving in age; young fellows knocking around at sea.

Q. Do you know his age; whether he was sixteen or forty? A. I know that he wasn't forty.

Q. Are you sure that he wasn't sixteen?

A. No; I couldn't say that.

Q. How often had you been aboard of that ship?

A. I couldn't tell you; I used to go aboard of her occasionally.

Q. How often had you been aboard of her before that day?

A. I couldn't say, because I never keep account going aboard those ships.

Q. Are you willing to swear that you were ever aboard of that ship before? A. Yes, sir.

Q. What did you go there for?

A. We went aboard; we usually go aboard with the shipping clerk; go aboard several times.

Q. What time?

A. Merely going aboard of her; that's all.

Q. You had no business aboard of her at all?

A. No, sir; no business aboard.

Q. Did you ever have any talk with the crew?

A. No, sir.

Q. Did you ever have any talk with the officers?

A. Only when we meet them at Davis, the stevedore's office.

Q. You know the stevedore, don't you?

A. Yes, sir.

Q. You know all these stevedores?

A. No, sir; I don't know all of them.

Q. Do you know Jensen?

A. Yes, sir.

Q. How long have you known him?

A. Since he has been working around the wharves.

Q. How long ago has that been?

A. I couldn't say how long.

Q. Who asked you to come up here?

A. I was subpoenaed to come up here.

Q. Who subpoenaed you?

A. Jensen?

Q. Didn't he come to see you before you were subpoenaed?

A. He has seen me time and again down there.

Q. He had a talk with you about the case?

A. No, sir.

Q. He never said a word to you?

A. No, sir; not about the case.

Q. Didn't he know what you saw? A. No, sir.

Q. How did he find that out?

A. By them telling him down there.

Q. You never told him?

A. No, sir. I told him what I seen after he came out of the hospital.

Q. How old are you? A. Thirty-eight.

Q. Do you think this young man that you saw was as old as you are? A. No, sir.

Q. Did you ever have any talk with this young fellow that you speak of? A. No, sir.

Q. You don't know his name?

A. No, sir; I do not know the mate's name, only he is the mate.

Q. The young fellow wasn't the mate, was he?

A. No, sir; not that I know of.

Q. Nor the second mate?

A. I couldn't say whether he was the second mate or not.

Q. The young fellow was neither one of the mates?

A. I don't know whether he was the mate or not?

Q. If he ran around to help the mate, of course he wasn't the mate

A. No, sir; the one in the hold I call the mate—the one that was down between decks that I always called the mate.

Q. You didn't know in what capacity this young man was at all? A. No, sir.

Q. You don't know where he belonged to?

A. He belonged aboard the ship.

Q. Where did he live? A. Aboard the ship.

Q. Are you sure of that?

A. That is what they say.

Q. Who said so?

A. That is what I say myself. I don't know whether he lived there or not. Sometimes they live ashore. Sometimes they sleep aboard and eat ashore.

Q. Where did you get this information from that he belonged to the ship?

A. Nothing, only seeing him knocking around there, that's all.

Q. You didn't know every man in the stevedore's gang, did you?

A. No, sir; only by sight.

Q. Did you know them all?

A. Those that knocked around the wharf I know—the stevedore's men—by eyesight.

Q. Did you know every man in the stevedore's gang working there that day?

A. No, sir; I couldn't swear to that.

Redirect Examination.

By Mr. PRICHARD.

Q. Do you know whether or not this barrel was freshly painted?

A. I couldn't say anything about the barrel; I don't know whether it was freshly painted or nothing at all about it.

PATRICK O'DONNELL, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. I am foreman for Mr. Davis, the stevedore.

Q. In April, 1892, were you working on board the ship "Joseph B. Thomas"?

A. To the best of my knowledge, I was; yes, sir.

Q. Were you working on her the day the accident happened to Mr. Jensen? A. Yes, sir.

Q. Did you have charge of the gang of men?

A. Yes, sir.

Q. What were the stevedore's men doing on that boat?

A. Putting in case oil before the accident happened; they were loading.

Q. I suppose the stevedore had entire charge of the loading?

A. He had charge of the gang of men that were there.

Q. Can you state the names of the men who constituted this gang on that day?

A. I couldn't state the whole of them.

Q. Do you know how many you had?

A. Yes; I could tell very nearly. I had fourteen men, I should judge, to the best of my knowledge.

Q. Have you any record anywhere of their names?

A. No, sir.

Q. Do you know who took off the hatch coverings of this forward hatch on the morning of the day of the accident?

A. I couldn't say any more than our own gang.

Q. They were taken off by the stevedore's men?

A. To the best of my knowledge, yes, sir.

Q. State what you know about this accident?

A. As far as the accident is concerned, it is this: We were putting in case oil. We try to keep case oil from under the hatch. Then we have to make a stage to work easy, to build it up. When we got finished that case oil that day I called the gang in off the wharf to tear this stage up and put it back. I called the gang in off the wharf to do it, to hurry the work along. Jensen general-

ly did work on the wharf, and I called them all in to hurry the work along. I think it was very near the last case, to my knowledge, was up. After I got the stage up, I used short wood to chock it, and the second mate of the ship jumped down to see how much short wood I was using. He came down to see whether I was using too much. He stood there a minute and said it was all right. He started to climb up the forward stanchion of the forward hatch. He got up as far as the combings, when he put his hand over and sung out to a boy, to the best of my knowledge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand, put it under his foot to help him over, and I heard somebody halloo "under," and when I looked down the hatch I saw this man laying on the floor of the ship—that is, Jensen. I ordered a stage to be slung, and sent down to hoist the man out. He was hoisted out and took over to Mr. Davis' office, and I went over and washed him off, and the patrol wagon came and took him to the hospital.

Q. Did you see what it was that fell down and struck him? A. Yes, sir.

Q. What was it?

A. It was a keg about the size of a vinegar barrel or a cider barrel. They generally use them for a water cask in the forecastle. I should judge, about two feet high.

Q. Did it belong to the stevedore's men?

A. No, sir; it belonged to the vessel, I suppose. It didn't belong to the stevedore.

Q. Do you know who it was that went forward to help the mate up?

A. No, sir; I couldn't say that. I was in between decks.

Q. Do you know whether or not all of your gang were down in the hold? A. No, sir.

Q. Do you know how many of them were away?

A. No, sir; I couldn't say.

Q. Do you know where those were who were down in the hold?

A. The hatch tender was on the forecastle deck, of course, and I had one man between decks with me, getting out wood, to the best of my knowledge now. Of course I never thought I was going to be cross questioned on it, or I might have remembered more.

Q. Would your pay roll show the exact number of men you had working on that ship?

A. Yes, sir; we keep every day's pay, and can tell what a man makes a week. I think I can come within two, to the best of my knowledge.

Q. Did you have any connection with the ship at all, or did any of your men; that is, were you in the employ of the ship?

A. I am not in the employ of the ship at all, but of Mr. Davis, who was the stevedore for the ship.

Q. Is he part of the crew of the ship?

A. No, sir; he has nothing to do with her, any more than to load her.

Q. He was an independent stevedore?

A. Yes, sir.

Cross-Examination.

By Mr. EDMUNDS.

Q. Mr. Davis had the contract for loading this vessel as stevedore? A. I suppose so.

Q. You were his foreman? A. Yes, sir.

Q. The gang of men working there were your men?

A. Yes, sir; under my control.

Q. Under your control solely. A. Yes, sir.

Q. Jensen was one of them? A. Yes, sir.

Q. Jensen, with a number of others, was working in the lower hold, stowing? Is that correct?

A. No, sir.

Q. Where was he working?

A. He was working on the wharf.

Q. I mean at the time that he was hurt he was in the lower hold?

A. Yes, sir; helping to lift up the cases of the stage.

Q. That is, he was performing the usual work of a stevedore in the lower hold at that time?

A. Yes, sir; so far as helping.

Q. How many men were down in the lower hold at that time, do you think?

A. To the best of my knowledge, I suppose there was about twelve men.

Q. The other two men, you don't know positively where they were, except that one of them must have been the tender on the forecastle hatch?

A. One was there, and one in between decks with me,

helping me to get out wood. I can't say whether there was twelve or thirteen at the present time.

Q. You don't know how many there were?

A. Not at the present time.

Q. How far was it from the lower hold up to the ceiling above you—the between decks ceiling?

A. I should judge about eighteen feet.

Q. To get from that lower hold up to the between decks you have to go up a stanchion, don't you, with steps on it, or how do you get from the lower hold to the between decks? A. By a ladder.

Q. Was that the ladder that the mate was coming up?

A. No, sir; the mate wasn't down in the lower hold.

Q. You were in the between decks?

A. Yes, sir.

Q. What was there above you—wasn't there a hatchway between you and the forecastle head?

A. Two hatchways—the main deck and the forecastle deck.

Q In the first place, there was a hatch through the forecastle head?

A. The top of the forecastle head—that went about four feet to the main deck.

Q. Then there was a hatch opening from that main deck down to the between decks?

A. Yes, sir.

Q. That was about how far?

A. I should judge about seven feet.

Q. Then there was a hatch from between the decks down into the lower hold which was about eighteen feet?

A. Yes, sir.

Q. So that there were really four holes from the top of the forecastle down to the lower hold decks?

A. No, sir; three holds.

Q. You say the mate was in the between decks; is that right? A. Yes, sir.

Q. You were in the between decks?

A. Yes, sir.

Q. There was another man there helping you with the wood in between the decks?

A. Yes, sir.

Q. Where did you get the wood from?

A. Forward in the eyes of her.

Q. Was that wood to chock with?

A. Yes, sir.

Q. Cord wood or old junk stuff?

A. Cord wood, I think, to the best of my knowledge—short cord wood.

Q. You got that from forward?

A. Yes, sir; from the eyes of the ship.

Q. Do you remember whether you got it off the starboard or port side?

A. The port side.

Q. This man brought you the wood?

A. No, sir; we both got it out together.

Q. You came across from the port eyes of the ship to the hatch, and put it down the hatch to the men who were doing the stowing as dunnage?

A. Yes, sir.

Q. There was only one man helping you?

A. Yes, sir; to the best of my knowledge.

Q. Who else was in there besides you and the mate and this one man? Did you see anybody else there?

A. No, sir; not to the best of my knowledge.

Q. Was there any cargo stowed in between decks?

A. Yes, sir.

Q. Was that full?

A. We don't stow cargo very few times forward of the forward hatch. I don't recollect now whether it was full or not.

Q. Was there a bulkhead across there?

A. A bulkhead of cargo—freight.

Q. You mean a bulkhead that you put there?

A. Freight.

Q. I mean that there was no permanent bulkhead of any kind forward of the cargo? A. No, sir.

Q. Was there any permanent bulkhead in the between decks forward of the cargo?

A. I think there was for coal—to hold coal.

Q. Do you mean the ship's coal?

A. Yes, sir.

Q. All the wood for dunnage that you were using you were getting from the between decks forward on the port side? A. Yes, sir; that day.

Q. To the best of your knowledge, there was only one man helping you? A. Yes, sir.

Q. It was from the between decks to the main dcek that the mate was going up?

A. Yes, sir; to the main deck.

Q. Who was on the main deck beside the mate—did you see anybody or did you not notice?

A. I couldn't see anybody. I couldn't see. I was standing at the forward part.

Q. Where were the hatch coverings?

A. Forward of the fore hatch on the main deck.

Q. Where did your men have their drinking water?

A. They generally have it in the hold?

Q. Do you know where they had it that morning?

A. No, sir; I generally have a bucket that we carry with us?

Q. Did you have a light in the lower hold?

A. Daylight; nothing but daylight.

Q. You didn't see how this accident occurred yourself?

A. No, sir.

Q. You don't know except that it occurred?

A. Nothing more than I saw the man lying there. I didn't see it hit him. I saw one single case of oil there, which I think was left out.

Q. You heard somebody halloo, or was it you that hallooed "get from under"?

A. No, sir; somebody on the forecastle deck hallooed "under."

Q. All the men got under and got out of the way except this man.

A. I suppose so; he was the only man hit.

Q. It was usual for your men to take the hatch coverings off, wasn't it? A. Yes, sir.

Q. You have no recollection how they were piled except that they were forwarrd of the fore hatch; that is all you know, is it not?

A. One on top of the other; yes, sir.

Q. They would come up to about level with the hatch combings, I suppose?

A. Well, I don't think they would within about three or four inches.

Q. How high were the hatch combings?

A. I should judge about nine to ten inches.

Q. I mean the forward hatch combings?

A. Yes, sir.

Q. Was the hatch covering in two or three pieces?

A. I think two.

Q. With ring bolts on the corner to lift them up by?

A. Yes, sir.

Q. Was it the first or the second mate that was coming up the hatchway that you are speaking of?

A. It was the second mate, as far as we understand it.

Q. It was the man that you understood was the second mate? A. Yes, sir.

Q. And he had not got up all the way, as I understand, at the time this keg upset or fell down?

A. He got up far enough to put his hand over the combings and sing out for help.

Q. I mean that he was not up on the deck?

A. No, sir; his body was about from the deck to the top of the hatch combings, and his leg was below.

Q. His hands were on the hatch combings, I suppose?

A. Yes, sir; to the best of my knowledge, that's the way of it.

Redirect Examination.

By Mr. PRICHARD.

Q. Where was your hatch tender?

A. He was on the forecastle deck.

Q. Do you recollect what the mate said when he called out for help?

A. To the best of my knowledge, I think he hallooed "under" too when the rest of them hallooed "under."

Q. When he called, what did he say?

A. I couldn't say.

Q. Do you know whether he called out the name of anybody to help him?

A. No, sir; I couldn't say that.

Q. Mr. Edmunds has asked you about these hatch covers, and the piling of them. Were they properly or improperly piled?

(Objected to.)

Q. How were they piled?

A. One on top of the other.

Q. It has been testified to by one of the ship's witnesses that the hatch covers were not properly laid on the deck. Please state what you know about that, if anything?

A. I can't tell any more than one was laid down on deck and the other one on top of it.

Q. What was the proper way of piling those hatch covers?

A. I suppose one on top of the other.

Q. Were they piled on this day in any unusual manner?

A. No, sir. We generally take off the after hatch first, and then the forward one on top, so that when you go to put them on, the forward one is easier to put on, and there is no chance for a man to fall down when he puts the after one on.

Q. Was there any other way of piling those hatch covers which would have rendered them any safer, that you know of?

(Objected to.)

A. Not to my knowledge, there wasn't.

By Mr. EDMUNDS.

Q. I suppose you don't know now positively just exactly how those hatch covers were placed, except that they were placed on top of each other, do you?

A. No, sir; one on top of the other.

Q. That's all you recollect about it?

A. Yes, sir.

Q. You don't know specifically how it was done?

A. No, sir? I couldn't see on deck, of course.

Q. Do you know which one of your men placed them there?

A. No, sir; that would be impossible for me to tell.

MARTIN RYAN, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. Stevedore, laborer.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when the accident happened to Mr. Jensen?

A. Yes, sir.

Q. What were you doing there?

A. I was down there working, tearing up an oil stage.

Q. You were in the lower hold as one of the stevedore's gang? A. Yes, sir.

Q. Did you see Mr. Jensen struck by the barrel?

A. No, sir.

Q. How did you learn of the accident?

A. All I saw, I saw the second mate climbing up from between decks on the upper deck, under the gallant forecastle. The next I heard was, "Look out below." I jumped into the wing of the vessel to get out of the way, and I looked around and I saw the keg laying there and Jensen laying down.

Q. Do you know who took off the hatch covers in the morning? A. No, sir.

Q. You did not, I suppose? A. No, sir.

Cross-Examination.

By Mr. EDMUNDS.

Q. You don't know anything about the accident, do you? A. Well, no, sir; not exactly.

Q. You were in the lower hold at work along with this man?

A. Yes, sir; we had been working, and we were called up in the forward hold to tear up this oil stage to land the oil on.

Q. You saw the mate coming up the ladder from between decks? A. Yes, sir; climbing up.

Q. Just about that time you heard somebody halloo out, "Look out from under"?

A. "Look out below."

Q. You turned around and this man was lying there with the keg, hurt? A. Yes, sir.

Q. Where did you have your drinking water that day?

A. We used to have it in a bucket.

Q. Do you remember where you had it?

A. Yes, sir; we had it in the main hold—the main hatch.

Q. In a bucket or a keg?

A. We always had a bucket of water.

Q. Was it the second mate or the mate that you saw going up the ladder?

A. The second mate.

By Mr. PRICHARD.

Q. Did the keg that fell down belong to the stevedores?

A. No, sir; it belonged to the ship.

By Mr. EDMUNDS.

Q. Sometimes you do use things belonging to the ship to get drinking water in?

A. Oh, yes, sometimes; but our boss generally always finds us a bucket.

JOHN HUGHES, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business? A. Stevedore.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Mr. Jensen met with an accident?

A. Yes, sir; I was working down in the hold.

Q. At the time of the accident were you down in the hold. A. Yes, sir.

Q. State all you know about the accident.

A. We were all working there; I had just been lifting up some case oil, making a stage or platform to stand on, to pass back where it was raised up high. We were working there, clearing that up, and had just got done when somebody hallooed out "under." Of course I jumped out of the road. We were all working around in the hatch; as soon as I turned around and look around, I saw this man lying on the floor and the keg down by the side of him.

Q. Did you hear anything that was going on up above you?

A. No, sir; I don't know any thing about what was doing up there.

Q. Do you know who took the hatch covers off that hatch that morning?

A. No, sir; I couldn't tell you. We very often take them off in the morning as soon as we start to work; but whether we did that morning or not I don't know. We always take them off and put them down level, just off the combings—always clear of the combings.

Q. Do you recollect whether you helped take them off that morning?

A. No, I don't recollect whether I did or not; I might and I might not.

Cross-Examination.

By Mr. EDMUNDS.

Q. It takes two men to take them off, doesn't it?

A. Yes, sir.

CHRIS NELSON, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. I was working for the stevedore.

Q. Were you working on board the ship "Joseph B. Thomas" in April, 1892, when Jensen was injured?

A. Yes, sir.

Q. Where were you working at the time of the injury?

A. In between decks.

Q. What were you doing?

A. Passing down some wood. I was helping Mr. O'Donnell.

Q. State all that you know of the accident.

A. There was no ladder in the hatch. The second mate came down the stanchion, sliding down on the stanchion, and he went up the same way, and as he went up this keg came down. He hallooed to one of the boys or young men belonging to the ship to help him out of

the hatch, and Mr. O'Donnell, the foreman, helped him up, and the keg came down, and that's all I know.

Q. Do you know who took the hatch covers off that morning? A. No, sir.

Q. Do you recollect whether you helped or not?

A. No, sir; I didn't help, but I know that they were off. I know where the hatch covers were laying at.

Q. You didn't help take them off, you say?

A. No, sir.

Cross-Examination.

By Mr. EDMUNDS.

Q. The stevedore's men generally take the hatch coverings off? A. Yes, sir.

Q. How long have you been a stevedore?

A. About nine years I have been working for Mr. Davis.

Q. You were between decks. A. Yes, sir.

Q. Who else was in between decks?

A. Me and the foreman, Mr. O'Donnell.

Q. And the second mate?

A. Yes, sir; he came down.

Q. While he was going up this stanchion this keg came down?

A. Yes, sir; after he got on deck, as he got over the combings on deck.

Q. That is to say, you say he was all the way over the combings?

A. He got on top of the combings, and I saw the keg coming down. That's all.

Q. You don't know whether he stepped on the coverings or not?

A. I know that he had to get on them to get on deck.

Q. Do you know that his feet were over the combings?

A. Yes, sir; as he got on top of the combings the keg came down; that's all I know.

Q. Then your impression is that the second mate must have stepped on that hatch combing?

A. Yes, sir.

Q. As soon as he stepped on the hatch combing, that upset the keg; that's your idea, is it?

A. Yes, sir.

Q. Did you see that keg before?

A. Yes, sir; I saw it that forenoon. A young man was sitting painting it, and set it there to dry on the hatches.

Q. Which end was it on?

A. On the forward part of the hatch covering, on the port side.

Q. The port side of the ship was lying at the wharf?

A. Yes, sir.

Q. How wide do you think those hatch coverings were? A. About six feet, I guess.

Q. Then the keg would be about six feet away from the hatch combings, wouldn't it?

A. No, sir; there are two hatches. The two coverings were laid on the fore part of the combings—the fore part of the hatch, close by the hatch—and the keg was setting on top. It was painted and set there to dry.

Q. How big was the hatch?

A. It was pretty near square; I guess, about six feet.

Q. How many pieces were there in the hatch covering? A. Two.

Q. Those two pieces were laid on top of each other?

A. Yes, sir.

Q. That would make it about four feet away from the hatch?

A. They were laid clear of the opening of the hatch —the fore part.

Q. What was this young man doing that helped the mate up?

A. He belonged to the ship.

Q. What was he doing?

A. Working around the deck, mostly at anything.

Q. What was he doing at the time?

A. I don't know exactly what he was doing at the time, but I know one of the two young men had been painting that keg and set it on top of the hatches to dry.

Q. You don't know that it was this young man?

A. No, sir; because the second mate hallooed for help to get him out of the hatch.

Q. You didn't see the young man?

A. No, sir.

Q. But somebody come to help the mate up?

A. Somebody came there at the time.

Q. When the second mate called for somebody to help him, somebody came and took hold of his hands?

A. Yes, sir.

Q. O'Donnell helped him on to his feet, did he not?

A. Yes, sir.

Q. You don't know who it was that had hold of his hands, but what you do know, you say, is that about the time the mate got on to the hatch combing the keg came down? A. Yes, sir.

Q. How many hatch holes were there forward there?

A. Three. Three decks.

Q. One from the topgallant forecastle, and one up through the main deck, and one down into the lower hold? A. Yes, sir.

Q. How high was the space between the main deck and the forecastle?

A. About four feet, I guess.

Q. How high was it from the between deck and the main deck?

A. Between seven and eight.

Q. How high was the lower hold?

A. I don't know.

Q. Where did you get the wood from?

A. Right in the fore part of the ship—in the bow.

Q. In the eyes of the ship? A. Yes, sir.

Q. Which side? A. The port side.

Q. At that time you and this man were carting this wood backward and forward for the purpose of chocking—dunnage? A. Yes, sir.

Q. You were carrying it in your arms?

A. Yes, sir.

Q. And you got that on the port side, in the between decks? A. Yes, sir.

Redirect Examination.

By Mr. PRICHARD.

Q. What time of day was it that you saw this barrel setting on the hatch coverings to dry?

A. Some time in the forenoon.

Q. What time of day was it that the accident happened? A. In the afternoon.

Q. About what time, if you recollect?

A. Between two and four o'clock.

Q. Do you know the names of all of the stevedore's gang that day?

A. I know the men that were working there that day; I don't know them all; sometimes there are strangers; but I know all the men that are here to-day.

DANIEL McLEAN, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. I am a stevedore, working on the wharf.

Q. Were you working on board the ship "Joseph B. Thomas" in April, 1892, when Jensen was injured?

A. Yes, sir.

Q. What part of the vessel were you in at the time of the accident?

A. Down in the forward lower hold.

Q. State all you know about the accident.

A. We were taking up the stage of case oil—clearing the hatch up; we were all working there together. I saw the barrel come down, and I suppose it came off the upper deck; it hit this man and knocked him down.

Q. Had you ever seen that barrel before?

A. I don't suppose so; I might, but not exactly to take any notice of it.

Q. Do you know who took the hatch coverings off that morning?

A. I don't remember that exactly—whether it was us or not; I couldn't say exactly.

Q. You don't recollect, of course, whether you helped take them off or not?

A. No, sir.

Q. The stevedore's men usually take them off?

A. Yes, sir, if they were going to work there; if not, the crew would take them off.

Cross-examination waived.

ALFRED SPROGEL, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. Working at stevedoring.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Jensen was injured?

A. Yes, sir.

Q. What part of the vessel were you in at the time of the accident?

A. In the forward part, on the port side, in the lower hold, standing by the side of him when he was hurt.

Q. State all you know about the accident.

A. I was standing by the side of him when he was hurt, and I was the nearest man to him. How the keg came to come down the hold I couldn't say, but it was hallooed from above, "Under below!" Not knowing who did it, of course I jumped one side, and this gentleman tried to do the same thing, but the result was he got the keg upon his head. Whose fault it was, or anything like that, I can't say.

Q. Do you know who took the hatch covers off that morning? A. No, sir; I couldn't say.

Cross-examination waived.

CHARLES O'DONNELL, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business? A. Stevedore.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Mr. Jensen was injured?

A. Yes, sir.

Q. What part of the vessel were you in?

A. Forward of the fore hatch, in the lower hold, lifting oil.

Q. State all you know about the accident.

A. All I know about the accident is that the man that was hurt was about two feet from me when the keg came down. I heard some one sing out, "Look out be-

low," and the first thing I saw was him lying back against the cases, knocked speechless.

Q. Do you know who took the hatch coverings off that morning?

A. No, sir; I don't. I don't remember.

Cross-Examination.

By Mr. EDMUNDS.

Q. It is customary, I suppose, for the stevedores to take them off, isn't it?

A. I don't think we took them off that morning. I am not certain; I wouldn't say for certain.

JOHN F. DAVIDSON, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business? A. Burden tender.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Mr. Jensen was injured?

A. Yes, sir.

Q. What part of the ship were you in at the time?

A. I was at the main hatch, splicing the hook in.

Q. In what part?

A. On the upper deck. We had a stage built over the top of the hatch. I was splicing it in, and I heard a halloo, and I went forward, and there was a couple of men had this stage slung in between decks. Mr. Nielson was one and Mr. O'Donnell helped him.

Q. That is, they were carrying Mr. Jensen out?

A. Yes, sir; I hallooed to the engineer to go ahead.

Q. You did not see the accident?

A. No, sir.

Q. You did not see the barrel?

A. No, sir; if I had seen it there I would have taken it away.

Q. Do you know who took the hatch coverings off that morning?

A. I don't know; I didn't see anybody lift them.

Cross-Examination.

By Mr. EDMUNDS.

Q. You were at the main hatch?

A. Yes, sir.

Q. That would be quite a distance in the ship from the fore hatch?

A. I couldn't tell you exactly how far.

Q. Nearly fifty feet, wouldn't it?

A. I couldn't tell you that exactly.

HANS NIELSON having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business?

A. I am a stevedore; I was down below in the hold, like the rest of them.

Q. You were on the ship when Mr. Jensen was injured?

A. Yes, sir; in the lower hold.

Q. State all you know about the accident.

A. I heard them halloo, and I saw the keg come down.

Q. You didn't see anything that was going on up above, of course? A. No, sir.

Q. Do you know who took the hatch coverings off that morning?

A. No, sir; they were off when I came there.

JOHN BROWN, having been duly sworn, was examined as follows:

By Mr. PRICHARD.

Q. What is your business? A. Stevedore.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Mr. Jensen was injured?

A. Yes, sir.

Q. What part of the vessel were you in at the time of the accident?

A. On the starboard side, in the lower hold.

Q. State all you know about the accident.

A. I was down there, and I heard somebody halloo "Look out below!" I happened to run one side to get out of the road, and I saw the keg come down and strike this gentleman. I went out to the hospital with him.

Q. Do you recollect who took the hatch coverings off that morning?

A. No, sir;; I don't. I was working on the wharf at that time, and I went down in the hold to help them out to get this stage of oil away.

Q. Do you know where all the stevedore's men were at the time of the accident?

A. There was some of them—the biggest part of them were down in the hold, I believe—that is eight, anyhow.

Q. Do you know how many men you had in the gang at that time? A. No, sir; I don't.

Cross-Examination.

By Mr. EDMUNDS.

Q. You don't know where the rest of them were, of course—they were scattered around?

A. No; they were scattered around.

Q. What time do you usually take the hatch coverings off when you come in the morning, or do you leave them off over night?

A. I don't know about taking them off—whether we took them off or not; I wasn't there; I was working on the wharf. We generally take them off at seven o'clock, when we go to work in the morning.

Q. It takes two stevedores to do that, don't it?

A. Yes, sir.

Q. There are two ring bolts, and one man takes hold of each corner and lifts it off?

A. Yes, sir. The hatch has nothing to do with the keg, though.

Q. You say the hatch coverings were off?

A. Yes, sir.

Q. You were on the starboard side, in the lower hold?

A. Yes, sir.

Q. The space between you and the between deck ceiling was how much—eighteen feet?

A. I couldn't say exactly how many feet.

Q. The space between the hatch of the main deck and the forecastle was how much?

A. I never took a measurement of that; I couldn't tell you.

Q. How many hatch holes were there from the topgallant forecastle down to the lower hold?

A. I generally work on the wharf; I couldn't tell you that exactly; I don't remember.

Q. Do you remember the height of them, or anything about them? A. No, sir.

Q. You don't know who took the hatch coverings off nor when they were taken off?

A. No, sir.

By MR. PRICHARD.—Q. When one hatch covering is put on top of another one, the top one rests upon the ring bolts?

A. Yes, sir.

Q. How about if the hatch coverings are the same size?

A. Well, there is no chance for the hatch to fall down. If there is anything placed on top of the hatch, certainly it will fall down in the hold.

Q. Are the hatch coverings level or are they curved?

A. I couldn't say.

HENRY HENDRICKSON, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. What is your business?

A. A longshoreman, working down on the wharf.

Q. Were you on the ship "Joseph B. Thomas" in April, 1892, when Jensen was injured?

A. Yes, sir.

Q. What part of the vessel were you in at the time of the accident?

A. I was in the lower hold.

Q. State all that you saw of the accident.

A. All I saw about it, I heard somebody hallooing up above; then next I turned around, and I heard something come down the hatch, and I turned around and found Jensen laying on the bottom of the vessel and the keg rolling off of him. That's all I can state.

Q. Do you know who took the hatch coverings off that morning?

A. No, sir.

Cross-Examination.

By MR. EDMUNDS.—Q. You don't know whether they were taken off at all that morning?

A. No, sir.

Q. You were working with a gang on the wharf?

A. Yes, sir; I was working on the wharf. I was all around the vessel, too; that's the way I worked all the time.

Q. What time do the stevedores usually take those hatch coverings off—do they take them off in the morning or leave them off over night?

A. They generally take them off whenever they need

to; we take them off in the morning when we start to work.

Q. You generally take them off, do you?

A. The men in the hold generally take them off.

By MR. PRICHARD.—Q. At the time of the accident you were actually down in the lower hold?

A. Yes, sir.

By MR. EDMUNDS.—Q. You had been with a gang on the wharf and you were called on board?

A. Yes, sir.

JOHN GABLE, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. What is your business?

A. Engineer for C. W. Davis.

Q. Were you on the ship "Joseph B. Thomas" in April ,1892, at the time this accident happened to Mr. Jensen?

A. No more than when he was hurt I hoisted him out of the hold and went up the gangway and helped to carry him ashore.

Q. Where were you at the time of the accident?

A. Out by the engine, on the wharf.

Q. Did you see the accident at all?

A. No, sir.

Cross-Examination.

By MR. EDMUNDS.—Q. You don't know anything about it?

A. No, sir; no more than I have said.

Q. You worked for Davis?

A. Yes, sir; I was engineer for him.

JENS P. JENSEN, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. You are the plaintiff in this case and the man who was injured?

A. Yes, sir; I am twenty-nine years old.

Q. State all that you know about this accident that happened to you on the ship "Joseph B. Thomas."

A. I can't tell you nothing, because I know I was down there and put that oil away; that's all I do know, because I got struck and I didn't know myself for five weeks.

Q. What were you doing on the ship?

A. I was putting oil away.

Q. You were one of the stevedore's gang?

A. Yes, sir; I was on the wharf there.

Q. And you were called in to go down in the hold?

A. Yes, sir; I was working in the lower hold at the time of the accident.

Q. Did you hear anybody halloo from above?

A. No, sir.

Q. The first you knew was what?

A. I was laying up in the hospital in bed.

Q. How long did you stay in the hospital?

A. About fifteen or sixteen weeks.

Q. What did they do to you there?

A. They fixed my head up—operated on my head

twice, I think. That's what they say; that's all I know about it.

Q. Did you have any pain?

A. No, sir; not much. I can't speak very high.

Q. Since you have come out from the hospital what have you been doing? A. Nothing.

Q. Why have you been doing nothing?

A. Because I can't.

Q. Can't you work?

A. No, sir.

Q. What is the trouble?

A. Because I have no use of my right arm.

Q. How are your legs?

A. The leg is pretty good; sometimes I can't walk without a stick.

Q. Your right arm, however, you can't use?

A. No, sir; I have no use of it at all.

A. Can you grasp anything in your right hand?

A. No, sir.

Q. How are your left arm and leg?

A. All right.

Q. Do you sleep all right?

A. Oh, yes; I sleep all right.

Q. Do you eat all right? A. Yes, sir.

Q. How is your right arm and hand—have they been improving?

A. No, sir; not much. Well, just a little bit. First I couldn't move it at all.

Q. So that it has improved a little and you can move it a little? A. Yes, sir.

Q. What kind of health had you had prior to this accident?

A. I was always healthy; I never was sick.

Q. What has been your business?

A. Working along shore for the last ten years.

Q. Had you ever had an injury before?

A. No, sir.

Q. Something has been said here about your having an injury to the back of your head.

A. No, sir.

Q. You did not have any injury to the back of your head?

A. No, sir.

Q. What wages were you earning at the time of the injury?

A. Three dollars a day of ten hours.

Q. How long had you been getting those wages?

A. For the last five years.

Q. Are you dependent upon your earnings for your living—have you any means?

A. No, sir.

A. What supports you now?

A. Oh, well, I run my chance; somebody pays my board one week, and another another week.

Q. Then you are living on charity?

A. Yes, sir.

Q. Are you married?

A. No, sir.

Q. How is it with your talking; does it affect your talking any?

A. Sometimes it does and sometimes it don't.

Cross-Examination.

By MR. EDMUNDS.—Q. You say your appetite is good and you sleep well?

A. Yes, sir.

Q. Your arm is getting better slowly?

A. Yes, sir; it is slowly, too.

Q. Your left side is all right?

A. Yes, sir; the left side is all right.

Q. You subpoenaed these witnesses today that you had here, I suppose, did you?

A. Yes, sir.

Q. You subpoenaed them yourself?

A. Yes, sir.

Q. You say you got three dollars for ten hours' work?

A. Yes, sir.

Q. You worked for Davis? A. Yes, sir.

Q. Did you have steady work?

A. Yes, sir; we had steady work.

Q. You do not mean to say that you had it every day?

A. Pretty nearly; I didn't lose a day in a month, I don't think.

Q. Suppose you did not have a job?

A. We always had it; they generally have two ships laying there; besides they have a big line of steamers running.

Q. There is no work at this season of the year, when the river is frozen up, is there?

A. There is plenty of work.

Q. There is no stevedore work, is there?

A. Yes, sir.

Q. You say that you were unconscious from the time that you were struck by the barrel until you woke up in this hospital and found yourself in bed?

A. Yes, sir.

Q. Was that after the operation had been performed?

A. About five weeks, I think, from what the doctor said.

Q. I mean when you first woke up in the hospital; do you say that was five weeks after you went in there?

A. Yes, sir; I think four or five.

Q. That is to say, you didn't know anything from the time of the accident until four or five weeks after you had been in the hospital. Is that right?

A. Yes, sir.

Q. Your general health is pretty good, with that exception, isn't it?

A. Yes, sir.

Q. You don't remember of ever having had anything to hit you before in the head?

A. No, sir; I never did.

Q. What is your nationality?

A. Dane.

Q. How long have you been in this country?

A. About twelve years.

Q. What were you before—a sailor?

A. No ,sir; I was a laborer.

Q. You have no family at all of any kind over here except yourself?

A. No, sir.

Redirect Examination.

By MR. PRICHARD.—Q. You heard today the testimony of the doctor that you walked into the hospital yourself and talked. Have you any recollection of that at all? A. No, sir.

Adjourned.

Philadelphia, February 28th, 1893.

Present: The Commissioner, Mr. Craig; Messers. Prichard and Edmunds, of counsel.

PATRICK O'DONNELL, recalled.

By MR. PRICHARD.—Q. Since the last meeting have you ascertained positively whether the men who testified here at the last meeting, viz., yourself, Martin Ryan, John Hughes, Chris. Nelson, Daniel McClain, Alfred Sprogel, Charles O'Donnell, John F. Davidson, Hans Melson, John Brown, Henry Hendrickson, John Gabel, Jens P. Jensen, constituted the entire stevedore gang who were working on the ship "J. B. Thomas" at the time of the accident to Mr. Jensen, or whether there were any others not included in that list?

A. I discovered there was another man in the gang—one more; that was by looking at the pay roll.

Q. What was his name?

A. Charles King.

Q. Was he working on the vessel or on the wharf?

A. Working on the vessel at that time.

Q. Do you know what his address is?

A. No, sir; I do not.

Q. He is still employed by Mr. Davis?

A. Yes, sir.

Q. Were there any others besides Charles King or the ones which I have mentioned?

A. No, sir; the pay roll shows that. I fetched the book up here with me. (Witness produces book). On the right hand side of this book is the time for the week after April 16th, 1892. It is kept in lead pencil and is marked "Ship 'Joseph B. Thomas..' "

By MR. EDMUNDS.—Q. What day of the week was this accident upon?

A. Monday, I believe; the beginning of the week.

Q. How many do you make as being engaged working on that Monday, by this book?

A. I did not count it up. The timekeeper gave it to me. I told him to have it ready.

Q. Is it not in your handwriting?

A. No, sir.

Q. There appears to be working Monday a man by the name of Jenks; who is he?

A. That is the way we put his name down, "Jenks"—"Jenks Jensen." We write his name down just "Jenks" —I do. The timekeeper may have it "Jens Jensen."

Q. You were working there also?

A. Yes, sir.

Q. I find here that all these names of the men who worked on Monday in this book are ticked except Jenks and Charles King.

A. Let me look at it, and I will explain that to you. He was working there. He ain't ticked.

Q. Don't you see that Jenks' name is not ticked?

A. No, sir.

Q. And he is put down as being there ten hours on Monday?

A. Yes, sir.

Q. Charles King is not ticked, either?

A. I could not say. I did not look at it.

Q. He is put down, also?

A. Yes; he is an extra man; that wasn't here that they found out was there.

Q. That is to say, this book shows that Jenks and Charles King worked on Monday?

A. Yes, sir.

Q. But their names are not ticked?

A. No, sir.

Q. All the rest of them who worked on Monday and who are here are ticked; is that right?

A. I could not say. I didn't do that ticking. I told the timekeeper to get the book ready, so as to have it ready. I am not ticked either by the timekeeper's notes.

Q. You are not ticked before that, either?

A. I am not ticked here.

Q. I suppose there was some reason?

A. No reason I know. It is only just to show who was and who was not there.

Q. When was this book made up; do you know?

A. It is made up every week, and then it is put down in a big book.

Q. It is taken from this book into a big book?

A. Yes, sir.

Q. Who carries this book?

A. The timekeeper carries that book.

Q. Who is the timekeeper?

A. Charles Hanson.

Q. Was he working there, also?

A. No, sir.

Q. Then the information he gives is derived from where?

A. From the man keeping time.

Q. Does he know which men work?

A. He goes aboard the ship and takes the men's names that are there.

Q. I suppose you pay them according to that book, do you?

A. Yes, sir; according to the book.

Q. You know that King was working there with that gang? A. I do; yes, sir.

Q. You had forgotten that?

A. Yes, sir.

Q. You feel pretty certain that that is all who were working there in your gang?

A. Yes, sir; the book will show that.

Q. But the book is not in your handwriting?

A. No, sir.

Q. Indeed, you don't know anything about it except you brought it up here today?

A. That is all. The time is given there to the timekeeper; he comes there and gets it.

Q. Whose handwriting is that in lead pencil?

A. The timekeeper's.

Mr. PRICHARD.—I offer the book in evidence, and ask that the stenographer copy on the notes the names of the men and the hours they worked on Monday.

(Mr. Edmunds objects to the book being offered in evidence as it is incompetent, irrelevant, and immaterial, and for the further reason that the book has not been proven, or the entries thereof, in the manner required by law to insure its competency.)

The copy of the portion of the book which Mr. Prichard requested the stenographer to make is as follows:

	M.
√ Pat O'Donnell	10
√ Jno. Hughes	10
√ Dan McClain	10
√ Mart. Ryan	10
√ All. Sprogel	10
√ C. O'Donnell	10
√ Fred Davidson	10
√ C. Neilson	10
√ Jno. Brown	10
Jenks	10
√ H. Hendricks	10
Chas. King	10
√ Hans Nelson	10
√ Jno. Gabel	10

Thursday, April 27th, 1893, 3 P. M.

Present: The Commissioner, Mr. Craig; Messers. Prichard and Edmunds, of counsel.

Dr. WILLIAM L. TAYLOR, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. You are a graduate of what college?

A. The University of Pennsylvania.

Q. How many years' experience have you had as a practicing physician?

A. I have been practicing for seventeen years in the city of Philadelphia. My office is 1340 North Twelfth street.

Q. Have you recently, at my request, made an examination of Mr. Jensen?

A. I have. I made examinations on the 6th and 9th of April, the present month.

Q. Please state in your own way the result of your examinations.

A. I found on the left side of the head an irregular scar measuring four and three-quarters inches in length, with depression and some loss of skull; paralysis on the right side of body, most marked in the right arm; atrophy of the muscles of the arm and leg, also shoulder, and partial loss of sensation of the whole right side of the body; a condition of mental hebetude.

Q. State what, so far as you know, judging from the

physical condition of Mr. Jensen, was the cause of that condition.

A. The cause of that condition has been injury to the brain structure, and most probably laceration, with depression of the skull—thickening of the membranes of the brain—continued pressure by that thickening.

Q. Is his present condition the result of natural disease or artificial injury?

A. It is, no doubt, due to injury. His history is a clear one, nonsyphilitic in character. The location of the injury has produced the conditions which he complains of now. He has injury on what we term the motor centers —injury to the centers of the brain, which would produce loss of power on the opposite side of the body.

Q. You say the injury would produce the results. To what injury do you allude?

A. Injury to the skull and injury to the brain.

Q. Did he give you any information as to that injury?

A. Yes, sir; that he was injured on board ship, or in the hold of a ship, by the falling of a cask, and necessarily the crushing of the skull, subsequent loss of consciousness and so on.

Q. And that is the injury to which you refer when you said that these results might be attributable to it?

A. Undoubtedly.

Q. What is the effect of his present condition upon his present capacity to work?

A. As far as his muscular capacity is concerned, I should consider that he had not sufficient muscular power in the right side of the body to do any work with the arm.

As far as walking is concerned, he could walk moderately well by dragging the right leg after him. The condition of his mind is such that memory is necessarily defective, and he would not be mentally sufficiently accurate for work.

Q. What are the probabilities, from a medical standpoint, of the permanency of these injuries, or of his gradual recovery?

A. The results of the injury will necessarily be permanent, and increasing in severity, I believe. I believe there will be a greater loss of muscular power, as those muscles atrophy by time. I believe that the brain will ultimately become weaker. There is a possibility, and a grave possibility, of epilepsy supervening. There is also a possibility of imbecility or insanity—not only a bare possibility, but a grave possibility. That is the condition which occurs frequently after injuries of this kind. Abscesses of the brain may supervene.

Q. If I understand you correctly, then, there is no medical probability of any increase of earning capacity in his case?

A. I believe that there is not any possibility of increasing earning capacity, and I believe that his earning capacity, which is virtually nil now, will be diminished as he becomes older—if there is any earning capacity at all now.

Q. Do you know his age?

A. Thirty-one. There were several conditions of which he complained.

Q. State whether in your examination there were any

indications of other troubles or diseases which would aggravate his present condition.

A. There is no evidence of any syphilitic trouble that I could find. I inquired very particularly as to that, and made efforts to find any evidence of constitutional disease, syphilis, and so on; there was no evidence of it.

Cross-Examination.

By MR. EDMUNDS.—Q. You say you are in active practice in Philadelphia and have been for seventeen years?

A. Yes, sir.

Q. This man came to you himself, did he?

A. He was sent to me by Mr. Prichard.

Q. He came by himself?

A. The first time he came by himself. The second time he had a man with him.

Q. Where is your office?

A. Twelfth and Master. He came up there.

Q. Did he tell you where he lived?

A. He did. He lived on Prime street.

Q. That is about three miles from your office, is it not?

A. Fully that, I should judge.

Q. He came with a note from Mr. Prichard, did he?

A. No; I do not think he had a note, as far as I can remember now.

Q. What did he tell you when he came?

A. He told me that he came from Mr. Prichard.

Q. Did he tell you for what purpose?

A. For the purpose of examination.

Q. He gave you his history himself in detail?

A. Yes, sir.

Q. He told you what his life had been and what troubles and diseases he had had?

A. Simply by my questioning him as to the possibility of syphilitic trouble.

Q. Did you not ask him about anything else?

A. I asked him if he had had any disease of any kind which could possibly lead to trouble of that kind.

Q. Then your inquiries to him were of the same character and to the same extent as you would have made of any other patient who came there for examination?

A. Precisely.

Q. He volunteered about as much as any patient usually volunteers, and the rest of it you obtained by questions; is that true?

A. Yes, sir.

Q. You say you examined him. State the process of examination in detail.

A. I examined him by means of stripping the clothing from the body, by measurements and by puncturing the skin on both sides of the body to ascertain the difference in sensibility on the two sides; by the use of a Faradic battery for the purpose of ascertaining the amount of electro-contractility in the muscles.

Q. He was stripped to do that?

A. Yes, sir; the object of the measurement was to ascertain if there had been any wasting of the muscles.

Q. The object was to ascertain whether the measurement of the muscles upon one side was symmetrical, or the same size as those on the other side?

A. Yes, sir.

Q. Have you never seen in the course of your practice a difference in the size of the muscles on opposite sides in people in perfect health?

A. Yes, sir; the right side is always larger than the left where it is a right-handed person.

Q. Then you have seen marked occasions of dissymmetry in perfectly healthy subjects?

A. Yes, sir. In perfectly healthy people they are larger on the right than on the left, where they are right-handed; but in this case the muscles on the right side of the body were atrophied.

Q. Would not that result from the absence of use for a limited time?

A. Do you mean of the whole side of the body? It might.

Q. I suppose there are very few people who are perfectly symmetrical on both sides?

A. Very few.

Q. Did you ever see one in your lifetime?

A. I have measured quite a number, and I do not believe I ever saw one completely symmetrical.

Q. Indeed, one side of a man's face is very seldom like the other side?

A. That is so; yes, sir.

Q. As to the Faradic battery, state how you applied it.

A. I applied it by means of moist electrodes applied from the origin and along the body of the muscle.

Q. Beginning at the origin, you put what pole there?

A. The positive pole, and the negative along the

course of the muscle. It matters very little which pole is placed to the origin and which along the body of the muscle. It produces the same effect.

Q. The object being to place one pole at the seat of the injury and the other along the line of the muscle presumed to have been injured or defective?

A. Yes, sir.

Q. What is the effect of that in a healthy muscle?

A. The muscle will contract powerfully.

Q. That is, it will reply spasmodically to the touch?

A. Spasmodically, or with a tonic reaction, according to the method of application.

Q. I speak now of the method in which you applied it.

A. My application was intended to produce spasmodic contraction of the muscles.

Q. That would have been the result if the muscles had been in a healthy condition?

A. Yes, sir.

Q. Did you not find that the muscles did reply to this treatment?

A. I did. The muscles did reply. You will find that where there is any muscular structure left there will be a response, no matter how small a quantity of muscle there may be left.

Q. So that, in point of fact, electricity, for the purpose of determining the condition of the muscles, is relative in its effect?

A. It is, certainly, according to the size of the muscle.

Q. That is to say, the healthier the muscle, the more positively it will reply?

A. Yes, sir.

Q. Where did you put the positive pole? State the locality.

A. At the origin of the muscle.

Q. What muscle?

A. All the various muscles of the arm, and leg besides.

Q. You put it at the inception of the muscles which you were experimenting upon?

A. Yes, sir; one group of muscles after the other.

Q. Those were upon the right side?

A. Yes, sir.

Q. You ran with the other pole along the course of the muscle until its insertion at the other end?

A. Yes, sir.

Q. Gradually watching its effect, I suppose, and there was some reply?

A. Yes, sir.

Q. Was the battery of much strength?

A. It is an ordinary Fleming battery; a powerful battery that I have used for some time.

Q. Is it a hand battery?

A. No; an ordinary liquid battery.

Q. You say it was a wet battery. Do you mean that you had a sponge on it?

A. I mean that the electrodes were wet. They were moistened with hot water.

Q. The effect of hot water is to soothe the muscle, is it not---hot applications of any kind, unless they are too hot?

A. Yes. If they are too hot they will irritate the muscles?

Q. But the effect of warmth upon muscles is to soothe them?

A. Yes, sir; while a dry electrode does not permit the passage of the current so readily as a wet electrode.

Q. But it is quicker to reply?

A. Yes, sir.

Q. Did you experiment in the same way upon the muscles of the man's body on the opposite side?

A. I did.

Q. Did you find any marked difference between them?

A. The difference was marked between the two sides of the body.

Q. Was he better able to use his left arm than he was his right?

A. Many times.

Q. If the right side of the body had been quiescent for five or six months, the appearance of the muscular system on the right side would be different from that on the left, anyhow, would it not?

A. Yes, sir.

Q. Was this examination made upon his first visit?

A. The general examination, the measurements and so on, were made at his first visit. The electrical examination was made at the second visit.

Q. Then you were not satisfied with your first examination?

A. At the first examination the fluid of my battery was not sufficiently strong, I thought, for a satisfactory examination, and consequently I replenished my battery.

Q. You do not know anything about what this man's condition was at the time he was hurt?

A. No sir.

Q. Do you know when he was hurt?

A. He gave me the date.

Q. Do you remember it now?

A. April 11th, 1892.

Q. So that you examined him about a year after the injury? A. Yes, sir.

Q. You could not, of course, have told whether there was any improvement in the man's condition between the time that he was hurt and the time when you examined him?

A. I could not.

Q. Might any of these conditions which you saw in the man, about which you have testified, be explained as the result of the treatment at the time of the injury?

A. No sir.

Q. Might any of them be explained as the result of neglect at the time of the injury?

A. No, sir.

Q. Give your reasons for stating that.

A. Simply for the reason that the local evidence of brain injury would be sufficient in itself to account for the general condition.

Q. Brain injury is susceptible of favorable treatment in these days, is it not?

A. It is.

Q. And it is possible to remove even particles of the brain?

A. It is.

Q. Not infrequently portions of the skull are removed?

A. That is frequently done.

Q. Did you see about this man any evidence of any former injury of any kind?

A. No, sir.

Q. Did you examine to see whether he had any?

A. I examined to see if there had been any injury to the skull.

Q. One of the physicians who has heretofore been examined in this case did discover evidences of former injury to his skull.

A. I did not find it.

Q. You said something about several conditions of which he complained; what did you mean by that?

A. One was partial loss or loss of sexual power; another was partial loss of control of the bladder—partial paralysis of the sphincter of the bladder.

Q. That was the result of an injury to a nerve center?

A. Yes, sir.

Q. Nerve injuries, or injuries to the nervous system are within the control largely of medical treatment, are they not?

A. They are; if there is no laceration or permanent pressure upon the brain or spinal chord.

Q. That pressure, however, with proper medical or surgical treatment might be removed?

A. Not in some cases. Where there is a brain cicatrix, that would be, if extensive, impossible to remove with relief of symptoms.

Q. I do not understand exactly how an injury at the brain end of the spinal chord could affect the sphincter of the bladder; can you explain?

A. I explain that by general injury to the brain tissue; it has been produced through the necessary paralysis of the muscles, not only of one side of the body, but also the sphincter muscles, which may occur under such circumstances.

Q. Have you seen similar cases?

A. I have seen similar cases where there has been paralysis of the sphincter due to brain concussion—due to brain laceration.

Q. Did you examine this man's eyes?

A. I did not.

Q. Your examination was principally with the electric current and measurements?

A. The electric current and measurements and my efforts to ascertain the difference in sensibility of the two sides.

Q. What did you use for the purpose of ascertaining the difference in sensibility?

A. I have a needle which I carry in my pocket case, which answers the purpose readily.

Q. Then it is done by puncturing?

A. Yes, sir.

Q. You tried that on both sides of the body?

A. Yes, sir.

Q. You tried it within the view of the patient? He saw what you were doing?

A. I believe at the time he had his eyes closed. I am not quite certain of that. I generally have their eyes closed at the time, but I am not certain whether that was the case with him or not.

Q. He is otherwise physically strong, is he not?

A. He is a strong, muscular man.

Q. Did you find any diminution of the size of the muscles in his legs?

A. There was a difference between the right and left—not so marked as there was between the right and left arm.

Q. Did you try him to see whether he could hold anything in his hands?

A. I did on the right.

Q. Did he have any difficulty in holding things?

A. His grasp was imperfect, unsteady and uncertain.

Q. What did you give him to hold?

A. He held my hand, I know, for one thing; he held fast to that—grasped that. I noticed him hold his cane without his knowledge, so as to see just the amount of power which he had in the hand.

Q. He held it?

A. Yes, sir; but very unsteadily; with a purchase that was very uncertain.

Q. Are you a homeopath or an allopath?

A. I am a regular physician, an allopath, so called.

Q. If this man had had a contusion of the lower posterior portion of his skull at the same time, it would be possible that all the conditions that you have mentioned might be referable to that?

A. No, sir; I believe not.

Q. You do not think an injury in the position which I have mentioned might result in those troubles?

A. No, sir.

WILLIAM B. GRAY, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. What is your business?

A. Clerk of the Pennsylvania road.

Q. Where are you stationed?

A. At Reed Street Wharf.

Q. Do you remember going on board the ship "Thomas" on April 11th, 1892, with Mr. Fitzgerald?

A. I remember going on board with Mr. Fitzgerald.

Q. Were you on board at the time the accident happened to Mr. Jensen? A. Yes, sir.

Q. State in your own way all you know in reference to it. In the first place, how came you to go on board?

A. I went aboard for a piece of rope. I asked Mr. O'Donnell, the boss of the stevedores, and he said he hadn't any, and called to the mate. The mate said that he would get me a piece. The mate was about climbing up the forward stanchion of the ship to the main deck. The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the combings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and threw the cask up in the air, and it went down in the hold. Mr. O'Donnell was helping the mate.

Q. That is all you know of the accident?

A. Yes, sir.

Cross-Examination.

By MR. EDMUNDS.—Q. Where were you standing, forward or aft of the hatch?

A. Aft of the hatch,

Q. Which hatch was it?

A. The forward hatch.

Q. The hatch covering was where?

A. Forward of the hatch.

Q. Between decks, or on the spar deck?

A. Between decks.

Q. You were standing on the deck above?

A. Yes, sir; the main deck.

Q. The mate was coming up out of the lower hold?

A. Yes, sir.

Q. On the forward stanchion?

A. Yes, sir.

Q. When the mate had got about as high with his head as the top of the hatch in the between decks, O'Donnell and another man attempted to help him?

A. I saw O'Donnell attempt to help him.

Q. Some one stepped on this hatch covering?

A. Yes, sir.

Q. That produced the fall of the barrel?

A. Yes, sir.

Q. Are you prepared to swear with any certainty who it was that stepped on that hatch covering?

A. No, sir.

Q. Are you willing to swear that the other man who was assisting O'Donnell was a sailor connected with the ship?

A. No, sir.

Q. O'Donnell was one of the stevedore's gang, was he not?

A. Yes, sir; he was foreman.

Q. You were not connected in any way either with the ship or with the stevedores?

A. No, sir.

Q. Do you remember how many holds that vessel had? She had a lower hold and between decks. Had she any more than that?

A. I could not say with certainty.

Q. About what was the distance from where you were standing to the between deck where the hatch coverings were?

A. About eight feet.

Q. There was no deck above you at all?

A. No, sir.

Redirect Examination.

By MR. PRICHARD.—Q. Where did you say the hatch coverings were?

A. Forward of the hatch.

Q. On which deck?

A. The deck of between decks.

Q. Not on the same deck that you were?

A. No, sir.

Q. Where was the barrel?

A. It was on the deck between decks.

Q. Where was the mate coming to? Was he coming up to the deck where you were?

A. No, sir; he was coming up to the deck of between decks.

Q. So that you were on the deck above the deck to which the mate was coming?

A. Yes, sir.

Q. O'Donnell was on the same deck on which the hatch coverings were?

A. No, sir.

Q. Which deck was he on?

A. He was on the deck below that.

Q. I suppose O'Donnell helped the mate from below?

A. Yes, sir.

Q. Who helped the mate from above?

A. Nobody helped him from above. The man that upset the cask was to help him.

Recross-Examination.

By MR. EDMUNDS.—Q. How many men were between decks?

A. I could not say.

Q. There was more than one, wasn't there?

A. Yes, sir.

Q. They were men, all of them were they not?

A. That I cannot say. I know there were some boys around the ship. I cannot say whether they were between decks or where they were.

Q. This man who tried to help the mate up—was he a man? A. Yes, sir.

Q. Was he a full-grown man?

A. Yes, sir; he was not between decks.

Q. Who was the man that was between decks?

A. The man that upset the cask.

Q. Was he a full-grown man?

A. That I could not say. From where I was standing I could not see him.

Q. You did not see him at all, then?

A. No, sir.

CHARLES KING, having been duly sworn, was examined as follows:

By MR. PRICHARD.—Q. You are a stevedore?

A. Yes, sir; I work along shore.

Q. On April 11th, 1892, were you one of the men in the employ of Mr. Davis?

A. Yes, sir.

Q. Were you one of the gang working on the ship "J. B. Thomas" under Mr. O'Donnell as foreman?

A. Yes, sir.

Q. Do you recollect an accident happening to Mr. Jensen on that day?

A. Yes, sir.

Q. State where you were on the ship at the time.

A. I was in the between decks. I was carrying wood forward. That was dunnage. As I came back for another armload, I happened to see a cask come down the hold and I hallooed. It hit Jensen on the head and threw him to the floor.

Q. Were you on the same deck that Mr. O'Donnell, the foreman, was on? A. Yes, sir.

Q. Do you recollect where the hatch coverings were?

A. No, sir.

Q. The barrel came down from above?

A. Well, it came from above?

Q. That is all you know of the accident?

A. Yes, sir; that is all I know of the accident.

Q. You did not throw the barrel down?

(Objected to as leading.)

A. No, sir.

Q. You did not tread on the hatch coverings?

(Objected to as leading.)

A. No, sir.

Cross-Examination.

By MR. EDMUNDS.—Q. What are you doing now?

A. I am working on the wharf for Mr. Davis.

Q. Were you working for Davis a month ago?

A. Yes, sir.

Q. Have you been working for him right along?

A. I have been working for him ever since before the accident happened, all the time.

Q. Do you know why you were not produced here at the examinations before?

A. No, sir.

Q. Did anybody ask you to come?

A. No, sir; not until I was told of it, and then I was surprised that I did not come when the rest of the men came.

Q. How long has it been since you were told of it?

A. I could not say. The foreman told me about it, Mr. Hanson.

Q. How long do you think that was?

A. The very day that Mr. O'Donnell came up here; that is the day that it was told to me.

Q. After the other men had been examined?

A. Yes, sir.

Q. Where was this cargo being stowed at the time of the accident?

A. In the lower hold.

Q. Do you mean right next to the skin of the ship?

A. Yes, sir.

Q. The deck above that was what?

A. Between decks.

Q. The deck above that was what?

A. The deck of the ship.

Q. The spar deck?

A. Yes, sir.

Q. So that all she had was her between decks and the lower hold for cargo?

A. Yes, sir; as far as my knowledge went.

Q. You were on the between decks?

A. Yes, sir. I was rolling a barrel of oil out of the way to make a gangway for me to walk in and get the dunnage away.

Q. This barrel came from above?

A. Yes, sir.

Q. Therefore it must have come from the main deck?

A. It came from the main deck and struck this gentleman on the head.

Q. There was no barrel or hatch covering on the deck where you were working?

A. No.

Q. You would have been certain to have seen them if they had been there because you were working there, were you not?

A. Yes, sir.

Q. You were clearing out the place for the purpose of having room to work?

A. Yes, sir; getting some dunnage wood for the men below.

Q. You were going to pass dunnage wood down in the hold?

A. Yes, sir.

Q. How many men were at work there with you?

A. On my side there were three men and the foreman.

Q. Were you forward or aft?

A. Forward. On the other side, to my knowledge, there were two men.

Q. They were the stevedore's men?

A. Yes, sir.

Q. The ship kept her dunnage forward?

A. Yes, sir.

Q. Was that barrel of oil part of the ship's stores?

A. No, sir.

Q. Was it part of the cargo?

A. Yes, sir.

Q. Where was it to go?

A. It was to go in the lower hold. The dunnage I gave them was to chock off with.

Q. Therefore ,the oil that you were rolling was for the purpose of being loaded in the lower hold?

A. Yes, sir; from the between decks down.

Q. Was there any more of it there?

A. Yes, sir.

Q. How many barrels, do you suppose?

A. Indeed, I could not say.

Q. What were the other men doing?

A. They were rolling oil and hooking oil on.

Q. Hooking it on to lower from between decks down into the lower hold?

A. Yes, sir.

Q. Did you see the mate of the ship coming up from the lower hold?

A. No, sir; but I saw the mate of the ship down in between decks, and then I could not tell if he went up or not. You see, I went back to my work again.

Q. You do not know whether or not that was before or after the accident? A. No, sir.

Q. The people who were working around there were all men in your gang? A. Yes, sir.

Q. They were all men, so far as you know, that were working around there that you saw?

A. Yes, sir.

Q. You did not notice whether there was anybody on the upper deck or not, did you?

A. No, sir; I did not.

Q. Did you have light at all down there except what came in the hatch?

A. Only the light from above.

Q. How far was this hatch from the knightheads of the ship, do you think?

A. Indeed, I could not tell how far.

Q. You know about how much room you have in there where you were working, don't you? I mean in between decks, where you were?

A. We had a pretty good space in there to work around.

Q. Thirty or forty feet?

A. No; not quite that.

Q. What was the distance from the deck of the between decks to the ceiling of the upper deck—the under side of the upper deck—the height of it?

A. It was higher than I am.

Q. Was it as much as eight feet?

A. I could not say that.

Q. How did you get from between decks to the upper deck—how did the men get up there?

A. They came down with a ladder. Sometimes they came down with a rope's end—skin down the stanchion.

Q. There was a ladder there then, was there?

A. No, sir; no ladder; ;not on that hatch.

Q. Then men who went up and down, went up and down the stanchions, did they?

A. Yes, sir; at the time to knock off there was a ladder put down. We could not work with any ladder. If it was put up it would be broken.

Q. It would be in the way?

A. Yes, sir; also it would be broken with the draft.

Q. You were loading with steam power?

A. Yes, sir.

Q. Did you have a burden tender on deck?

A. Yes, sir.

Q. Was he on the main deck?

A. Yes, sir.

Q. Right at the hatchway?

A. Yes, sir; right at the hatchway.

Q. Did it take more than one man for that?

A. No, sir. Just one man. He has a whistle and gives the signal when to go ahead and when to come back.

Q. But you had to have somebody to stop the swing. Was he on the wharf?

A. There was an engineer on the wharf.

Q. He cannot stop the swing—somebody must do that on deck?

A. The burden tender on deck generally has a rope made fast to a ringbolt, and throws it around the fall and steadies it that way himself.

Q. That is what he was doing that day, was it?

A. Yes, sir.

Q. Do you remember upon what side of the hatchway he was standing?

A. Yes, sir; the port side.

Q. Was the ship heading up or down the stream?

A. Up the stream.

Q. You were loading in the forward hatch?

A. Yes, sir.

Redirect Examination.

By Mr. PRICHARD.

Q. Has this ship a forecastle head above her main deck? A. Yes, sir.

Q. That is at the bow of the ship and is higher than the main deck?

A. Yes, sir; I can hardly stand under it.

By Mr. EDMUNDS.

Q. She had a poop aft? A. Yes, sir.

Q. I suppose the forecastle head is pretty nearly flush with the poop? A. Yes, sir.

By Mr. PRICHARD.

Q. So that the highest part of the ship on which peo ple can walk would be the forecastle head and the poop, and the next lowest to that is the main deck?

A. Yes, sir.

Q. Below that is the between decks?

A. Yes, sir.

Signatures waived by consent of counsel.

Adjourned.

[Endorsed]: Filed August 8th, 1896. Southard Hoffman, Clerk.

Deposition of Edward Peterson.

Called for Claimant. Sworn.

Mr. ANDORS.—Q. What is your name, age, residence and occupation?

A. My name is Edward Peterson; age, 51; residence, San Francisco; occupation, seafaring man.

Q. How long have you been going to sea?

A. About thirty-five years; between thirty-four and thirty-five.

Q. How long, if at all, have you been officer of any ship or vessel?

A. I have been officer of a ship now off and on for about twenty-eight years.

Q. Are you the officer of any ship now?

A. Yes, sir.

Q. What ship? A. The "Joseph B. Thomas."

Q. When did you join that ship?

A. The day before yesterday.

Q. When did you first join her?

A. In Havre.

Q. In what year? A. Last year.

Q. In what capacity did you join her?

A. Second officer.

Q. You sailed from Havre in her, did you?

A. Yes, sir.

Q. To what port? A. Philadelphia.

Q. And from Philadelphia you sailed to San Francisco? A. Yes, sir.

Q. About what time did you leave Philadelphia on the voyage of which you have last spoken?

A. I think it was the 20th of April, 1892; the 20th or 21st of April, 1892, we left the dock.

Q. What time did you arrive in San Francisco?

A. We arrived here September 19, 1892, on a Sunday night.

Q. Before the ship sailed from Philadelphia on her late voyage to San Francisco was there a man injured on board of her, one of the stevedores gang?

A. Yes, sir.

Q. About what time in the day was it, if you recollect? A. In the afternoon.

Q. Do you recollect how long it was before the ship sailed?

A. No, sir; I don't. I couldn't say exactly. I think it was six or seven days; something like that. It might be more and it might be less. I am not exactly sure.

Q. At the time he was injured was the ship taking in or discharging cargo?

A. Taking in cargo.

Q. State if you know whether a stevedore was employed to store the cargo?

A. Yes, sir; a stevedore was employed.

Q. Where was the man when he was injured?

A. He was down in the lower hold forward under the fore hatch.

Q. At the time he was injured where were you?

A. I was up alongside the hatch combing on the main deck.

Q. The forward hatch combing?

A. Yes, sir; on the port side.

Q. On the main deck? A. Yes, sir.

Q. Where is that hatch situated, that is, the part of it that goes through the main deck?

A. In forward of the foremast.

Q. State whether it was or was not under the top gallant forecastle?

A. Underneath the topgallant forecastle.

Q. Then there was a hatchway through the topgallant forecastle directly above it?

A. Yes, sir.

Q. Who was standing there with you, if any one, alongside the hatch?

A. There was no one just alongside of me, but there was one of the stevedore's men came along.

Q. Never mind the stevedore's men. I mean of the ship's company?

A. The third mate was a little way from me. He was not alongside of me. He was a little ways of me.

Q. Outside of or underneath the topgallant forecastle?

A. Underneath the topgallant forecastle.

Q. Did you see the way in which the accident happened? A. Yes, sir.

Q. Go on; state how it happened?

A. There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the

keg off the hatch cover, and the keg went down through the hatch, and struck the man.

Q. Who was the man that trod on this hatch cover?

A. One of the stevedore's men. Which one it was I cannot say.

Q. It was one of the stevedore's men, but you do not know his name?

A. No, sir. I did not take particular notice which one it was.

Q. Were any others of the stevedore's men underneath the topgallant forecastle except this one that trod on the hatch?

A. I don't think there was.

Q. What was this stevedore's man doing when he trod upon the hatch cover?

A. I don't know exactly what he was doing. He just happened to come along and touch the hatch cover. Either he was going down in the hatch, or what he was going to do I don't know. I know he just happened to touch the hatch cover the least mite.

Q. Had this forward hatch cover been taken off that morning? A. Yes, sir.

Q. Who took it off?

A. The stevedore's men.

Q. State who took the hatch covers off in the morning when they went to work?

A. The stevedore's men.

Q. Where were these hatch covers piled?

A. In the forward part of the hatch coaming.

Q. State whether or not according to your experience

as an officer of a vessel, it is customary or usual, for the stevedore's men to take off the hatch covers when they go to work in the morning when they are taking in or discharging cargo?

A. Yes, sir; it is usual for stevedores to do that. It belongs to them to do it, to take the hatch covers off in the morning, and put them on before they go ashore in the evening.

Q. What sort of a keg was this?

A. A small pickle keg. There used to be pickles in it. The keg I should judge holds about four gallons.

Q. Then you saw this keg tippling over into the hatch did you say anything?

A. Yes, sir, I sang out, "Stand from under."

Q. Was there more than this one man that worked below in the stevedore's gang?

A. Yes, sir; there was a whole gang at work, but all went to one side except that man, and he never seemed to move at all. He did not seem to take any notice. All the rest went to one side.

Q. You say he did not seem to take any notice. Did you look down the hatch immediately?

A. Yes, sir; I looked down immediately when I sang out.

Q. Say if you saw the keg strike him, or if he was struck with it before you looked down?

A. No, sir; I see the keg strike him. As the keg went down I see it strike him.

Q. Then when the keg tipped over into the hatchway, you were standing right alongside the hatch coaming?

A. Yes, sir.

Q. On which side of the hatch, port or starboard?

A. On the port side of the hatch coaming.

Q. What was the reason that this hatch cover tipped when the stevedore's man touched it, or stepped upon it?

A. It was not laid down as it ought to be. It was not laid down solid. If the hatch coverings were put down as they ought to be, one on top of the other, there would not be any trouble attached to it, but they just put them down any way at all as they were always in a hurry.

Q. That is the hatch covers tipped on account of it being piled up; from the way in which they were piled up by the stevedore's men? A. Yes, sir.

Q. How many hatch covers were there?

A. Three.

Q. Were they crowning at all?

A. Yes, sir; a little crown to the hatch.

Q. After the man was hit he was brought up, I suppose? A. Yes, sir.

Q. Did you see him when he was brought up from below?

A. Yes, sir; I seen him when he was brought up.

Q. Did you notice whereabouts the keg had hit him?

A. It struck him on the head, somewheres. I did not see. I was only told.

Q. Never mind what you were told. You saw him when he was brought up?

A. Yes, sir; and I saw the blood.

Q. From his head or face?

A. From his head. I did not see the cut.

Q. Then he was taken ashore immediately?

A. Yes, sir.

Q. Will you look at the model now shown you, and marked claimant's Exhibit "A," and state what it is a model of?

A. That is a model of the bow of a vessel. That is the forward hatch on the main deck, and on the topgallant forecastle. (Pointing.)

Q. About how high is that topgallant forecastle on the "Thomas" from the main deck? How high are the timbers?

A. About five feet, I think. I think it is five feet. I would not say positively, because I never measured. I think it is about that. A little more or a little less probably.

Q. On which side of the hatch, on the main deck, were these hatch covers piled, forward or aft?

A. On the forward.

Q. How near to the hatch coaming?

A. As close as they could lay; as close as they could pile them alongside of the hatch coaming.

Cross-Examination.

Mr. HOLMES.—Q. What were you doing at the forward hatch at that time?

A. I was not doing anything. I was doing something under the top forecastle, and stopped to look down in the hatch to see what they were doing. We were taking in cargo and I looked down occasionally while they were taking in cargo.

Q. You had nothing to do with the loading of the vessel at that time? A. No, sir.

Q. And you mean to tell us then that just as this keg tipped over and fell down you happened to be looking down? A. Yes, sir.

Q. Just at that moment?

A. Just at that moment, yes, sir.

Q. What were you doing under the forecastle head?

A. I don't exactly recollect what I was doing. I had underneath there two boys, and the third mate, finishing something I was doing. I cannot recollect now what I was doing. There is always something.

Q. How far was this work from the forward hatch?

A. I should judge about ten or twelve feet from the hatch.

Mr. ANDROS.—Q. That is where you had been at work? A. Yes, sir.

Mr. HOLMES.—Q. Had you finished that work?

A. Yes, sir.

Q. And just at that instant you walked over, and looked down, and down went the keg? A. Yes, sir.

Q. How high was the coaming to that hatch?

A. About eighteen inches, I guess; no, not so much as eighteen. I should say twelve inches. On the forward part the coaming is not so high on account of there being some thick planks, thicker than the deck.

Q. How much higher is the forward part of the deck there than the after part?

A. About an inch and a half.

Q. Is it not a fact that those coamings are more than a foot high even at the forward part of the hatch?

A. No, sir.

Q. That you are confident of.

A. That I am confident of.

Q. What made you first say about fifteen inches?

A. I was thinking about the main hatch.

Q. What is the size of that forward hatch?

A. I think she is about six or eight feet square.

Q. Six or eight feet square?

A. Yes, sir. It might be a little more.

Q. It was entirely open at that time, was it not?

A. Yes, sir.

Q. How is that hatch cover divided; into how many pieces? A. Three parts.

Q. How high are those parts each. How thick?

A. Each is about four inches.

Mr. ANDROS.—Q. Four inches high?

A. Yes, sir, four inches.

Mr. HOLMES.—Q. How much of a crown is there to them? A. Not much, just a little.

Q. Hardly perceptible to the eye?

A. Yes, sir; you can see it.

Q. Is it not a fact that when these three hatch covers of the forward hatch are piled, the one on the other, the lower one being flat on the deck, that they stand solid?

A. They stand pretty solid; yes, sir. One of them is laid on the other.

Q. Don't they stand absolutely solid?

A. They stand solid enough so that they would not do any damage.

Mr. ANDROS.—Q. That is when they are piled down as they ought to be?

A. Yes, sir; when they are piled down as they ought to be. There is a ring bolt in each corner of the hatch to lift them with, and when those hatches are not laid down properly they will wabble.

Mr. HOLMES.—Q. How near the forward part of the forward hatch did these covers lie?

A. They lay right close against the hatch coaming; as close as they could lay.

Q. You say it is customary for the stevedare's men to remove those and put them on? A. Yes, sir.

Q. Did you see them taken off that morning?

A. No, sir; I did not see them taken off that morning. I did not see exactly when they took them off. I see the way they were laying, and I cautioned the foreman stevedore many a time to lay them hatches down as they ought to be, because I said some one will get hurt yet the way you are throwing them down.

Q. You are not speaking of the forward hatch covers?

A. Yes, sir.

Q. Did you caution him that particular day?

A. No, sir; not that particular day, but several times I done it.

Q. You did not see who took them off that morning?

A. No, sir. I know the stevedore's men took them off. My men did not take them off.

Q. You do not know that from the fact that you saw who took them off or not?

A. No, sir; I did not see.

Q. Before this accident that day had you noticed that these covers were not properly laid on the deck; this particular day and these particular covers?

A. Yes, sir, I did. I see the way they were laying, but it was so usual to see them that way nearly all the time. When I had time to do it myself I altered them.

Q. Why did you not alter them that day?

A. I had not time to do it, and it was not my place to do it.

Q. How long would it have taken you to do it?

A. It would not have taken long to do it.

Q. Would it not have taken about a small part of a minute?

A. About a couple of minutes, but I did not happen to take any particular notice of it.

Q. Who do you say was with you there at the forward hatch?

A. The third mate was underneath the forecastle too —the third officer, and there was a couple of the boys underneath the forecastle too, but they were in the forward part—away forward.

Q. A man cannot stand erect on the main deck there under or near that forward hatch, can he?

A. No, sir, not straight.

Q. How tall are you?

A. I am five feet and a half. Five feet four.

Q. You have to stoop even? A. Yes, sir.

Q. Or your head would touch the ceiling of the topgallant forecastle?

A. It would touch the beam.

Q. This vessel is loading now?

A. Yes, sir.

Q. How are those covers piled this morning at the forward hatch?

A. Laying on the forward part of the hatch.

Q. Piled one on top of the other?

A. Yes, sir.

Q. And laying solid?

A. Yes, sir. Another thing, the way it is now, there is a regular cage around the hatch. It is boarded round the hatch up and down for the stevedore's men to work the cargo. They did it themselves so that the sling shall not go underneath the hatch coamings.

Mr. ANDROS.—Q. Those are guys to prevent the cargo from swinging outside the coaming when it goes down? A. Yes, sir.

Q. That is outside the coaming of the main deck?

A. Yes, sir.

Mr. HOLMES.—Q. You mean running from the main deck up to the topgallant forecastle?

A. Yes, sir.

Q. I am speaking of this morning now. Is it not a fact that that is only on the shore side of the vessel?

A. Yes, sir, on the starboard side, and on the forward part.

Q. Forward here as well? (Pointing on the model.)

A. Yes, sir.

Q. This morning who took off those hatches?

Mr. ANDROS.—I object to that as immaterial.

A. The hatch was not taken off.

Mr. HOLMES.—Q. The hatch was left open all night? A. Yes, sir, the main deck hatch.

Q. The forward hatch? A. Yes, sir.

Q. Who took them off when they were last taken off?

A. I was not on board, and couldn't say. I suppose the stevedores did.

Q. You don't know, then?

A. No, sir, I was not on board.

Q. How long had that keg been on this hatch cover before it fell?

A. That is more than I could say. I did not see how long it stood there.

Q. You saw the keg?

A. The first I saw of the keg was when I came forward and was through with my work, and stood on the forecastle. I saw the keg standing in the corner of the hatch.

Q. How long before the keg fell did you see it there?

A. I couldn't say exactly. It is so long since now, and I did not carry it in my memory.

Q. Was the first you saw of the keg when it rolled over and down the hatch, or had you seen it there before that?

A As I cast my eye on it I seen the keg and it went down.

Q. Was the keg empty or full?

A. No, sir; there was nothing in it.

Q. How do you know that?

A. I could see it when it fell.

Q. Did it have its cover off?

A. Yes, sir; no cover on.

Q. One of its heads off?

A. Yes, sir; one of the heads was off. The hoops had been painted.

Q. You say it was a pickle keg?

A. It had been a pickel keg, but used at the present time for fresh water to drink in the room.

Q. It belonged to the vessel? A. Yes, sir.

Q. Do you know who put the keg there?

A. No, sir; I don't.

Q. Had it any water in it at the time?

A. No, sir.

Q. It was empty of everything?

A. Yes, sir.

Q. You say a whole gang of the stevedore's men were in the lower hold? A. Yes, sir.

Q. You don't mean to say that that whole gang was immediately under the hatch, do you?

A. No, sir; the whole of them were right underneath us.

Q. When you called down how many were underneath the hatch. How many did you see when the keg fell?

A. I think I saw about four or five there.

Q. What were you loading at that time?

A. I don't recollect what they were taking in. I think they were stowing away kerosene, or rosin barrels. One of that; either kerosene or rosin barrels.

Q. They were all let down the hold there through that forward hatch? A. Yes, sir.

Q. By a sling?

A. Yes, sir; and stowed away. They had been taking it in through the forward hatch, and were stowing the cargo away down below.

Q. As soon as you saw the keg fall down you hollered out?

A. Yes, sir; I hollered out as loud as I could.

Q. You say the libelant was in the lower hold?

A. Yes, sir.

Q. What is the depth of the lower hold where he was standing from the forward hatch on the main deck?

A. I should judge it was about fourteen feet from the top part of the deck where he was; fourteen or sixteen feet; something like that.

Q. How high is it between decks?

A. Between decks is nine feet high. I think it is. I have not measured it. That is generally the run between decks, eight or nine feet.

Mr. ANDROS.—Q. Did she have double between decks?

A. No, sir; not double between decks. She has got beams in the lower hold.

Q. She has beams for the lower between decks?

A. Yes, sir, but there was no deck laid. There are beams for three decks, but there are only two decks laid.

Mr. HOLMES.—Q. As soon as this keg started down the hatch you called down below to look out?

A. I did.

Q. You don't know whether he heard you or not?

A. No, sir; I couldn't say. I know a whole lot of them seemed to jump to one side except this man. He did not seem to move at all.

Q. What particular thing was he doing at that time?

A. He was moving some of the cargo because he was stooping down. I couldn't say if he had hold of a barrel or box, or what he had hold of. He was at work.

Q. I suppose you did not see where he was hurt on account of the blood?

A. No, sir, I couldn't see where he was hurt.

Q. Was that the reason, on account of the blood?

A. Yes, sir. I did not go close to see. His head was covered up, and I could see the blood.

Redirect Examination.

Mr. ANDROS.—Q. When he was brought up out of the lower hold his head was covered up?

A Yes, sir; he had something round his head to stop the blood.

Q. When do you expect to go to sea again?

A. Next week, I think.

Q. Where are you bound?

A. We are bound to New York.

Q. Was there any cargo in the lower hold under the hatch at the time this man was injured?

A. Yes, sir.

Mr. HOLMES.—Q. How tall was this keg?

A. It stands about that high (illustrating).

Q. Give it in inches.

A. I should say about sixteen inches.

Mr. HOLMES.—I shall reserve the right to further cross-examine this witness before the vessel sails if I deem it necessary.

Mr. ANDROS.—I have no objection provided it is done before Friday night, because I am going away.

E. PETERSON.

Deposition of Henry Hannum.

Called for the claimant. Sworn.

Mr. ANDROS.—Q. What is your name, age, residence, and occupation?

A. My name is Henry Hannum, age, 19; residence, Philadelphia; occupation, mariner.

Q. How long have you been going to sea?

A. About eighteen months.

Q. Are you the third officer of any ship now?

A. Yes, sir; the "Joseph B. Thomas."

Q. Where did you first join the "Joseph B. Thomas" as third officer?

A. Philadelphia.

Q. When?

A. On the 26th of last March, a year ago.

Q. Had you been third officer of her before that time?

A. No, sir.

Q. Before that time had you been on board of her as a seaman?

A. No, sir. I joined her as third mate in Havre.

Q. Then when you joined her in Philadelphia a year ago last March did you join her as a seaman?

A. Yes, sir; an ordinary seaman, a boy.

Q. And then you came where?

A. To San Francisco.

Q. Then from San Francisco did you go to sea in her?

A. No, sir.

Q. Why not?

A. I went to Seattle to see a brother of mine. When I came back the ship had gone.

Q. Then what did you do?

A. I shipped in the "Berlin."

Q. Then where did you go to?

A. I went to Havre.

Q. When you arrived in Havre state whether the "Joseph B. Thomas" was there?

A. Yes, sir, she was there, and I joined her.

Q. You joined her there as third mate?

A. Yes, sir.

Q. From Havre you came where?

A. Philadelphia.

Q. And from Philadelphia here?

A. Yes, sir.

Q. That is her last voyage?

A. Yes, sir.

Q. While the ship was in Philadelphia do you know of one of the stevedore's men being injured in the lower hold of the vessel?

A. Yes, sir.

Q. At the time he was injured where were you. What part of the ship?

A. Standing under the topgallant forecastle.

Q. How near to the forward hatch?

A. I was about three feet away. When he was hit I was looking right over the hatch.

Q. Where was the second mate at that time?

A. Under the topgallant forecastle, near the fore hatch.

Q. How near to the hatch. Close by or away from it?

A. Pretty close.

Q. Where was this man that was hurt at work?

A. He was about even with the beams in the lower between deck.

Q. Working in the lower hold?

A. Yes, sir.

Q. How high in the lower between deck had the cargo been stowed. Under the square of the fore hatch?

A. I think about five feet under the lower between desk; five or six feet.

Q. What hit him, if you know?

A. It was a keg.

Q. What sort of a keg was it?

A. It was a pickle keg. I think it was one of these small pickle kegs.

Q. State whether that keg fell down through the hatch into the lower hold?

A. Yes, sir.

Q. Where was the keg before it fell?

A. It was setting on the fore hatch under the forecastle head.

Q. How happened it to fall down in the lower hold, if you know?

A. One of the men trod on the hatch, and the hatch tilted and the keg rolled off, and fell down.

Q. What man was it. One of the crew of the ship or one of the stevedore's men?

A. One of the stevedore's men.

Q. Do you know who took off the forehatch covering on that morning under the topgallant forecastle?

A. The stevedores.

Q. Where were these hatch covers piled?

A. Piled in the forepart of the hatch.

Q. Forward of the coamings?

A. Yes, sir.

Q. Forward of the forward coamings?

A. Yes, sir.

Q. When the keg tilted and fell over the coamings of the hatch did the second mate say anything?

A. Yes, sir.

Q. What did he say?

A. He sang out, "stand from under."

Q. Did you see the keg when it started?

A. Yes, sir, I see it, but I was too far away to get to it before it fell over the hatch.

Q. Had it hit the man before you looked down the hatch?

A. Yes, sir; just as I got there to the hatch I saw the keg fall.

Q. Who was under the topgallant forecastle besides you and the second mate and this man who trod on the hatch. Any of the boys or the ship's company?

A. Yes, sir; I think one of the boys was under there.

Q. How many belonging to the ship were on board of her at this time. Yourself, and second mate, and who else? A. Two boys.

Q. Was her crew then shipped at this time?

A. No, sir. They had all left.

Q. The only person that belonged to the ship was your self, the second mate, and these two boys at that time?

A. There was a steward and carpenter, and the port captain.

Q. Where was the master of her at that time?

A. He was at home.

Q. Do you mean in Philadelphia?

A. No, sir, at Thomaston, Maine.

Q. Where was the first officer?

A. He was home down at Thomaston.

Q. Do you know what this stevedore's man that trod on the hatch was doing, where he came from, or where he was going?

A. I think he came out of the water closet.

Q. He was crossing over the deck from one side to the other. Do you know which side he came from, and which way he was going?

A. He came from the starboard side.

Q. Which side of the ship lay to the dock?

A. The port side.

Q. When do you expect to go to sea again?

A. I think the ship will go in the fore part of next week.

Q. That is the "Joseph B. Thomas"? A. Yes, sir.

Q. You are still attached to her as third officer?

A. Yes, sir, I am going to sign to-day.

Cross-Examination.

MR. HOLMES.—Q. You are going then to New York from here in the "Joseph B. Thomas"? A. Yes, sir.

Q. And so is Mr. Peterson, the second officer?

A. I believe so.

Q. What had you been doing under the top-gallant forecastle prior to that accident?

A. I don't know. I don't remember.

Q. How long had you been there prior to the accident?

A. I had been under there an hour, I believe.

Q. You don't remember what you had been doing?

A. No, sir.

Q. Whatever you had been doing had you finished it at that time?

A. Yes, sir, just about finished.

Q. Where were you when the keg tumbled into the hatch?

A. Standing about three feet away from the hatch.

Q. Whereabouts?

A. On the port side of the hatch. I was standing about here underneath. (Pointing to claimant's Exhibits "A".)

Q. You had completed your work. A. Yes, sir.

Q. What were you then going to do?

A. I was going aft, not going to do anything particular. The second mate had not told me yet.

Q. Had you been helping the second mate in something whatever it was? A. Yes, sir.

Q. So that work was just finished and you came to this position that you speak of, three or four feet on the port side from the forward part of the hatch, as this keg fell through the hatch? A. Yes, sir.

Q. You say the stevedore's man took off these hatch covers that morning? A. Yes, sir.

Q. You don't mean to say you saw them take them off?

A. No, sir. But none of the ship's company took them off.

Q. That you don't know, either?

A. Yes, sir, I know that.

Q. Did you see them taken off?

A. No, sir, I know the ship's company did not take them off, because I would have to help them.

Q. They couldn't be taken off without your assistance then by the ship's company? A. No, sir.

Q. Why not?

A. I have always helped them. The stevedores take hatch covers off every morning when they come and start to work.

Q. I am speaking of that particular morning. How many men does it require to lift those hatch covers off?

A. Two.

Q. There are bolts at each end? A. Yes, sir.

Q. And one man at one end and another at the other can lift them off? A. Yes, sir.

Q. As a matter of fact, you don't know who did take them off that morning?

A. No, sir; I did not seen any one take them off.

Q. What makes you think this stevedore's man came from the water closet?

A. That is the only thing he could be doing under there that I know of.

Q. He had no business under there in loading the vessel? A. No, sir.

Q. The man who directs the sling stands on the topgallant forecastle? A. Yes, sir.

Q. There was no necessity of any one being on the main deck under the topgallant forecastle at the forward hatch to assist in loading the vessel through the hatch?

A. No, sir.

Q. And this man who you say trod on the hatch cover was not there in any business connected with the loading of the vessel at that time. A. No, sir.

Q. Are you sure you had no men on board at that time besides those you have named and the officers?

A. That is all.

Q. No men before the mast? A. No, sir.

Q. Do you know the name of the stevedore's man who you say trod on the hatch cover?

A. No, sir. There is only one that I know the name of, that is the foreman, Paddy.

MR. HOLMES.—I make the same reservation in regard to this witness as with the second officer.

Redirect Examination.

MR. ANDROS.—Q. Are those boys that were under the top-gallant forecastle at the time this accident happened on board the ship yet? A. No, sir.

Q. When did they leave. How long ago?

A. The day after we were paid off. The 23rd or 24th of last month.

Q. September? A. Yes, sir.

Q. Are any of the foremast hands aboard the ship yet? A. No, sir.

Q. Besides yourself, the second officer and the carpenter who else is on board?

A. Aboard the ship now is the steward, the cook, the captain, first, second and third mate, and the carpenter, and the painter.

Q. The painter made the voyage in her?

A. He just came out this passage. The voyage is not over until we get back.

Q. The painter made the voyage from Philadelphia?

A. Yes, sir.

MR. HOLMES.—Q. These two boys that you have spoken of are still in the city, so far as you know?

A. No, sir, I don't know anything about them.

Q. So far as you know they are?

A. So far as I know.

MR. ANDROS.—That is you don't know where they are?

A. No, sir, I don't know. No one told me anything about them, and I have not seen them.

MR. HOLMES.—You don't know that they have left the city?

A. No, sir, I don't know anything about them since they left.

HENRY HANNUM.

Witness my hand this 17th day of October, 1892.

J. S. MANLEY,

Commissioner U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed October 17th, 1892. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the United States District Court of the Northern District of the State of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,
vs.
THE SHIP "J. B. THOMAS,"
SAMUEL WATTS et al.,
Claimants.

Deposition of William J. Lermond, Henry B. Hannum and Ole Larsen, taken on behalf of the claimants in the above entitled cause, before George T. Knox, Esq., Notary Public, at the office of Messrs. Andros & Frank, 320 Sansome Street, Rooms 6 & 7, San Francisco, November, 9th. 1893.

Counsel Appearing: Walter C. Holmes, Esq., Proctors for Libelant. Messrs. Andros & Frank, Proctors for Claimants.

Deposition of Henry B. Hannum.

Direct Examination.

MR. ANDROS.—Q. What is your name?

A. Henry B. Hannum.

Q. In October, 1892, you were examined as a witness on behalf of the claimants in this case; since that time have you been to sea? A. Yes, sir.

Q. When did you last sail from this port?

A. About the middle of October, 1892.

Q. When did you return back to this port?

A. The 17th of September of this year.

Q. Are you still connected with the ship "J. B. Thomas" as one of the company of that ship? A. Yes, sir.

Q. In what capacity?

A. Third mate.

Q. When you testified in this case in October, 1892, you stated that at the time that Jensen was injured you and the second mate, and one of the ship's boys, and one of the stevedore's men, were under the topgallant forecastle; now, at that time were there any other persons under that topgallant forecastle except those that you mentioned at that time? A. No, sir.

Q. Just at and immediately before the time that the

cask fell into the hold, by which Jensen was injured, had the second mate come up from the between decks?

A. No, sir.

Q. If just at the time that the cask fell into the hold, by which Jensen was injured, the second mate came up from the between decks through the fore hatch, could you have seen him? A. Yes, sir.

Q. If any stranger from the shore had come in on the main deck under the topgallant forecastle, and had asked the second mate to give him a piece of rope, in your opinion, would you have heard him? A. Yes, sir.

Q. Did any person from the shore come on board the ship just before the accident happened, under the topgallant forecastle, and request the second mate, or any other person there, to give him a piece of rope?

A. No, I didn't see anybody, and there was nobody there.

Q. Did any person belonging to the ship, as one of the company of the ship, tread on the hatch covers, by reason of which the cask by which Jensen was injured was precipitated into the hold? A. No, sir.

Q. What means are there of getting from the between deck on to the main deck under the topgallant forecastle?

Q. There are no means when the hatches are off. When the hatches in the lower between decks are off there are no means of getting up.

Q. I am not speaking of lower between decks, but of first between decks; now, suppose you had at the time this accident happened, been in the between decks and

wanted to come upon deck, how would you come up, through what hatch?

A. Through the main hatch.

Q. What were the means of getting on the main deck from the between decks through the main hatch?

A. You come up a ladder.

Q. At the fore hatch under the topgallant forecastle, what means were there of getting from the between decks on to the main deck?

A. There are steps there when the hatches are on between decks.

Q. What means are there of getting from the between decks on to the main deck through the forward hatch when that hatch is open?

A. There are two hatches, and a hatch on the main deck. There is no way of getting up unless the hatch in the between decks is on.

Q. When the forward hatches i n the between decks are on, what means is there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is steps put there.

Q. At the time that this accident happened were the between decks forward hatches open or closed?

A. Open.

Q. And being open, what means were there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is no way of getting there.

Q. Do you know about what the distance is from the upper between deck to the main deck?

A. About nine feet.

Q. Then if they were working the forward hatch down into the lower between decks, and a person in the between decks wanted to come on the main deck, he would have to come up through the main hatch? A. Yes.

Q. Do you remember the names of these two boys who were on board the ship at the time this accident happened? I mean the two ship's boys?

A. I remember one of them.

Q. What was his name?

A. Victor Russ.

Q. How long, or about how long, after the ship arrived here in 1892, was it before these two boys left the ship, if they did leave it?

A. I believe it was about a week.

Q. Do you know what became of them, if they went to sea or not, of your own knowledge? A. No, sir.

Q. A witness by the name of John F. Fitzgerald has testified in this case as follows: That at the time of the accident "the mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up--the stevedore—to get on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he trod on that hatch." Is that true? A. No, sir.

Q. He also testifies the man who trod on the hatch was a man belonging to the ship; is that true?

A. No, sir.

Q. At this time was there any mate on board the ship except the second mate, and yourself as third mate?

A. No, sir.

Q. The first mate was not aboard? A. No, sir.

Cross-Examination.

Mr. HOLMES.—Q. If the witness Fitzgerald in his testimony just quoted to you had said second mate instead of mate, then that testimony would be true, would it not. A. No, sir.

Q. Were you working in loading the "J. B. Thomas" through the main hatch at the time mentioned?

A. No, sir, not through the main hatch.

Q. Don't you sometimes load through both hatches at the same time?

MR. ANDROS.—Objected to as immaterial as to what they sometimes do.

A. Yes, sir.

Q. How is that you can now recall that you were not on the day mentioned loading through the main hatch, as well as through the forward hatch?

A. We had only one gang of stevedores.

Q. How many stevedores are there in a gang?

A. I don't know.

Q. Then how do you know there was only one gang of stevedores? A. They were only working one hatch.

Q. You say that you were not working through the main hatch because you were working only one gang of

stevedores, and you also say you do not know how many stevedores there are in a gang; then how can you say that you were not that day also loading through the main hatch?

A. At the time the man was hurt they were working in the fore hatch.

Q. I will ask you again, then, how you can recall that fact a year and a half after this accident occurred?

A. I was there aboard the ship and saw them using only the one hatch.

Q. Can you or will you say that there had been no loading through the main hatch that day prior to Jensen's injury?

A. No, sir, I can't say.

Q. Suppose the main hatch between decks wa sopen how would a person in the between decks get to the main deck?

A. Come up a ladder.

Q. Through the main hatch on the main deck?

A. Yes, sir.

Q. Could the main deck be reached from the between deck through the main hatch on the main deck by that ladder just as well with the main hatch on the between decks open as covered?

A. No, sir.

Q. When you say that it is nine feet between the main deck and the between decks, that is your estimate, I suppose, not based on actual measurement?

A. No, sir, just my estimate; I didn't measure it.

Q. It would be quite difficult, would it not, for one to come from the between decks on to the main deck through the main hatch on the main deck, if the main hatch on the between decks were uncovered?

A. No, sir.

Q. You have stated it would be less easy to do so if the main hatch on the between decks were open than if covered? State why?

A. When the hatch on the between decks is on the ladder is hauled up.

Q. Hauled up where? A. On deck.

Q. On to the main deck? A. Yes, sir.

Q. Where is the ladder when the hatch on the between decks is open?

A. Down below; it goes down to the stanchion.

Q. According to your last few answers, if I understand them, it would be easier to go to the main deck through the main hatch on the main deck, if the main hatch on the between decks were open, is that so?

A. It would be just the same; you have to climb up a ladder anyway.

Q. Then why did you say a short time ago that it would be easier if the main hatch on the between decks was covered?

A. I said if the hatches were off.

Q. I asked you a moment ago the following question: "Could the main deck be reached from the between decks through the main hatch on the main deck by that ladder just as well with the main hatch on the between decks

open as covered?" To which you answered, "No, sir?" Was that answer correct? A. Yes, sir.

Q. Now you say the contrary, do you not?

A. No, I don't say that.

Q. What had you been doing immediately prior to Jensen's injury?

A. Working under the forecastle head.

Q. At what work?

MR. ANDROS.—Objected to as the witness has heretofore been examined on the whole subject as to what he was doing, and it is not in rebuttal to anything drawn out on the present examination.

(Proctor for libelant states that the object of the question is to test the memory of the witness.)

A. I could not say for sure. I believe we were cleaning out the locker.

Q. In your examination in October, 1892, as a witness in this case, you stated that you didn't remember what you were doing at that time; is your memory better now than it was then?

MR. ANDROS.—Objected to as the witness has not stated now that he knew what he was doing.

A. I said the same thing now as I said then; I don't remember exactly what I was doing.

Q. Do you now remember or state that in your former examination you said that you believed at that time you were cleaning the lockers out?

A. Yes, sir, I believe I did.

Q. What was Mr. Peterson, the second mate, doing just prior to Jensen's accident?

Mr. ANDROS.—Objected to upon the ground that the witness has already been, on the prior examination, fully cross-examined on the subject-matter of what Mr. Peterson was doing, and the question has a tendency to contradict him in respect to his present testimony.

(Proctor for libelant states that the object of the question is to test the memory of the witness.)

Mr. ANDROS.—The objection is that the memory of the witness is to be tested as to the matter on which he is now being examined, and not as to extraneous matters wholly disconnected with the subject-matter of the present examination.

A. He was helping us.

Q. At this work of cleaning out the lockers?

Mr. ANDROS.—Objected to as it assumes the work; the witness said he thought they were.

A. He was helping us at whatever we were doing.

Q. Do you know a Mr. Fitzgerald of Philadelphia?

A. No, sir.

Q. Do you know a man employed along the wharf by the Pennsylvania Railroad Company as a yardman, one of whose duties it was to set the cars ready for the stevedores and to move cars up and down from the ship?

Mr. ANDROS.—Objected to on the ground that no name is mentioned, and it does not appear that the witness Fitzgerald or any one has testified in this case, or that the attention of the witness is called to the testimony of Fitzgerald or any other witness who has testified in this case.

A. No, sir, I do not.

Q. Do you know a clerk of the Pennsylvania Railroad Company stationed at Reed Street, named Gray?

A. No, sir.

Redirect-Examination.

Mr. ANDROS.—Q. Referring to the ladder by which you came from the between decks through the main hatch on to the main deck, where does the foot of that ladder rest when the ship is anchored, on the keelson?

A. Yes, sir.

Q. Then if all the hatches were open is there any difficulty in going up from the lower hold or the between decks to the main deck on that ladder?

A. No, sir.

Q. I understood you to say that when the between decks hatches were closed the ladder was hauled up on deck? A. Yes.

Q. When the between decks hatches are closed, and you want to go from the between decks on to the main deck, how do you get up if this ladder is hauled up on deck; that is, on the main deck?

A. They have a shorter ladder they put up.

Q. If the ladder goes up through the between decks hatch to the main deck, the between decks hatch must be open, must it not, when the ladder is in place?

A. Yes, it must be open.

Q. What is the difficulty of going to the main deck on that ladder; is there any?

A. There is no difficulty.

Q. You have stated in your cross-examination that there was more difficulty in going on the main deck on this ladder when between decks hatches were open than when they were closed; did you understand that question, and if you did, what was the reason of its not being as easy when the hatches were open as when they were closed?

A. You have a longer distance to climb coming up out of the lower hold, then you do from the between decks. You have to haul the long ladder up, and put a short one down.

Recross-Examination.

Mr. HOLMES.—Q. Where does this first ladder you have spoken of, the long ladder, rest if the hold is full or partly full? I mean where does the foot of the ladder rest then? A. It rests on the cargo.

Q. Can you say whether, at the time of the accident to Jensen, the main hatch on the between decks was open or closed? A. I can't say.

Q. Can you say if at that time the main hatch on the between decks were closed that the short ladder you have spoken of was there in place?

A. No, sir, I can't say.

Q. Can you say if at that time the main hatch on the between decks were uncovered the long ladder you have spoken of was there in place?

A. No, I can't say.

Redirect Examination.

Mr. ANDROS.—Q. When the stevedores went below to work cargo through what hatch did they go, through the main hatch or forward hatch? Or the after hatch?

A. Through the main hatch.

Q. When they got through work or when ever they wanted to come on to the main deck, through what hatch did they come on to the main deck, whether the main hatch or the forward hatch?

A. Through the main hatch.

Q. At the time this accident happened were they loading cargo through the forward hatch?

A. Yes, sir.

Deposition of Ole Larsen.

Direct Examination.

Mr. ANDROS.—Q. What is your name?

A. Ole Larsen.

Q. Were you the carpenter of the ship "J. B. Thomas" on her voyage from Philadelphia to San Francisco in 1892? A. Yes, sir.

Q. Were you on board the ship at the time one Jensen was injured by a keg falling on to him?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir.

Q. Where were you at that time, on board the ship?

A. I think I was standing in the shop working.

Q. You didn't see the accident?

A. No, sir; I was at work in my shop.

Cross Examination.

Mr. HOLMES.—Q. Are you still on board the ship "J. B. Thomas" as carpenter? A. Yes, sir.

Q. And you were on board of her a year or so ago when she was in San Francisco?

A. Yes, sir.

Deposition of William James Lermond.

Direct Examination.

Mr. ANDROS. —Q. What is your full name?

A. William James Lermond.

Q. You are the master of the ship "J. B. Thomas"?

A. Yes, sir.

Q. Were you master of her in 1892?

A. Yes, sir.

Q. Were you master of her on her voyage from Philadelphia to San Francisco beginning in 1892?

A. Yes, sir.

Q. What month? A. April.

Q. Were you on board of her when a man by the name of Jensen, a stevedore, was injured on board of her?

A. No, sir.

Q. Did you have two boys on board of her who came to San Francisco? A. Yes, sir.

Q. How long after you arrived in San Francisco was it that those boys left the ship, if they did leave her?

A. Three or four days, I think.

Q. Did they ever return to the ship and rejoin her?

A. No, sir.

Q. At the time Jensen was injured were you on board the ship or away.

A. I was away.

Q. Where?

A. At home, Thomaston, Maine.

Q. Do you know the names of those two boys?

A. On the articles they were Ete Watten and Victor Russ.

Q. Do you know whether Ete Watten ever went by the name of Hans Watten?

A. Yes, he did on board the ship. That was the name he went by altogether on the ship.

Cross Examination.

Mr. HOLMES.—Q. Did these two boys leave when they were paid off?

A. No, sir, a day or two after. They were paid off on the 22nd, I think, of September, and they stopped two or three days after that on board the ship.

Q. And they were paid off how many days after the ship arrived?

A. The third day, I think; I am not certain.

Q. Were they paid off at the same time the rest of your crew were paid off? A. Yes, sir.

Q. At the shipping commissioner's office?

A. Yes, sir.

Q. Did you occasionally see those two boys, or either of them, after they left the ship?

A. I think I saw one of them along the side of the ship once; I am not sure; I think I saw him alongside of the ship once, this Hans.

Q. Any more than once?

A. No, sir, I think not.

Q. Did you ever see the other one?

A. No, sir, never.

Redirect Examination.

Mr. ANDROS.—Q. How long after they left the ship was it that you saw this boy of whom you have spoken, that you think you saw?

A. I don't remember; I think it was a day or so.

Q. Almost immediately after he left the ship?

A. Yes, sir.

Q. What date did you arrive?

A. I arrived here on the 19th of September, 1892.

It is hereby stipulated that the foregoing depositions, taken in shorthand, and written out may be read by either party on the trial of the cause in which they are entitled, subject to all objections as to materiality and pertinency of the questions and answers; but notice of the time, place and manner of taking said depositions, and as to the form of the interrogatories, and the reading over of said depositions to the witnesses when written out, and their signature thereto, and all other matters of sub-

stance, are hereby waived. And it is stipulated that said witnesses are about to depart on a voyage to sea.

WALTER G. HOLMES,
Proctor for Libelant.
ANDROS & FRANK,
Proctors for Claimants.

[Style of Court—Title and Number of Cause.]

Opinion.

Libel in rem to recover $10,000 as damages for personal injuries alleged to have been sustained in consequence of the negligence of the master of the vessel and of those entrusted by the owners of said vessel with its care and management. Decree for libelant in the sum of $6000.

Frank P. Prichard, Esq., and Walter G. Holmes, Esq., Proctors for Libelant.

Messrs. Andros & Frank, Proctors for Claimants.

MORROW, District Judge.—This is a libel in rem against the ship "Joseph B. Thomas" to recover sum of $10,000 as damages for personal injuries alleged to have been sustained in consequence of the negligence of the master of the vessel and of those entrusted by the owners of said vessel with its care and management. The libelant was one of a gang of stevedores engaged in loading the ship "Joseph B. Thomas," at the port of Philadelphia, and was injured on the afternoon of April 11th, 1892, while at work in the lower-hold of the vessel under the

forward-hatch. The gang of stevedores, including the foreman, consisted of 14 men. They had been engaged in loading case oil. At the time of the accident, most of the men, including the libelant, were at work in the lower hold under or near the forward-hatch, engaged, for the most part, in tearing up a stage which had been put in the hold in order to render the work of loading more easy. The testimony indicates that nine of the gang of fourteen men were located in the place just referred to; that the foreman and two other men were in the between decks at the forward-hatch; that the burden-tender was at the main hatch some fifty feet away; and that the engineer was on the wharf. The hatch covers, consisting of three pieces, had been taken off that morning presumably by the stevedore gang, although it does not appear which of the men performed that service. They were piled one on top of the other forward of the forward hatch on the main deck, and, so far as the evidence discloses, were piled in the usual and proper manner. It is true that the second mate, who testified on behalf of the claimants, stated that he noticed that day that the hatch-covers were improperly piled up, but I am unable to accept this testimony uncorroborated by any other witness, as I seriously doubt the credibility of the testimony of the second mate in other material respects. These hatch-covers were some what curved. The hatch combings were about 9 or 10 inches high, and the covers, piled one on top of the other, were nearly flush with the hatch combings. A keg, belonging to the ship, which had been freshly painted, was

placed by someone on these hatch-covers, to dry. This keg was knocked over into the hatchway and, in its fall, struck the libelant on the head, inflicting some very severe injuries. Before referring to the testimony on both sides, as to the manner and the cause of libelant's injuries, it is proper to say that no question of contributory negligence is raised in the case. The libelant was in the lower-hold, under the forward hatch, where he had a right to be, and was then in the discharge of his duties as one of the gang of stevedores.

The libelant contends that he was injured by reason of the negligence of those then in charge of the vessel in placing the keg on the hatch-cover at such close proximity to the hatchway, into which, if accidently jarred or moved, it was liable to roll or fall, to the danger of those of stevedore's gang who were working below under the hatchway. It is further claimed, in this connection, that the keg was knocked over by someone connected with the vessel, while hastening to assist the second mate to climb up out of the forward hatch from between-decks to the main deck. On the other hand, the claimants contend that the person who knocked the keg over was one of the stevedore's gang and a fellow-servant of the libelant, and that, therefore, the vessel is not responsible, in law, for any injuries sustained to the libelant thereby. The testimony is irreconcilably conflicting. In this connection, the evidence of two witnesses, not connected with the ship, nor with stevedore's gang who happened casually to be on board the vessel at the time the libelant was in-

jured, is of great importance in enabling the Court to arrive, substantially, at the real state of facts. These two witnesses, so far as the evidence discloses, appear to be disinterested. It may be observed at the outset, that the testimony of the libelant himself is of little value in determining how and through whose fault the injury arose. All that he knows about the accident is that he was at work in the lower hold under the fore-hatchway, when a keg fell and struck him on the head, rendering him unconscious. The testimony of the two witnesses just referred to is as follows: John F. Fitzgerald testified that was employed along the wharf by the Pennsylvania Railroad Company; that, on the 11th of April, 1892, he went on board the ship "Joseph B. Thomas"; that he went on board with a young man who desired to obtain a piece of rope, that, at the time of the accident, he was standing right over the hatch; that "the mate was between-decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. It wasn't a barrel, it was a keg"; that the keg was standing "right on the corner of the hatch. The hatches were taken off, and then put one on top of the other, and the keg set over and when you tread on that corner of the hatch that turned the keg over and it rolled down the hatch before anybody could get hold of it." He stated that the person

who trod on the hatch was a "young man belonging to the ship." On cross-examination, he re-affirmed several times the answer that it was a young man, belonging to the ship, who stepped on the hatch-covers, and that he had seen him several times before that on deck, having had previously occasion to go on board the vessel. He frankly admitted, however, that he did not know the young man's name and he did not know in what capacity he was employed on board the vessel. He did not know "whether he lived there or not. Sometimes they live ashore. Sometimes they sleep aboard and eat ashore." Wm. B. Gray, the person who accompanied the witness Fitzgerald on board the vessel and was present when the accident occurred, testified: "I went aboard for a piece of rope. I asked Mr. O'Donnell, the boss of the stevedores, and he hadn't any, and called to the mate. The mate said he would get me a piece. The mate was about climbing up the forward stanchion of the ship to the main deck. The hatching was laying there; that is, the covering of the hatch was lying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the combings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and threw the cask up in the air, and it went down in the hold. Mr. O'Donnell was helping the mate." On cross-examination, he states that he was standing aft of the forward hatch; that he cannot swear with any certainty who it was that stepped on the hatch covering; that he would

not swear that the person who did step on the covering was a sailor connected with the ship. On re-direct examination, he states that he could not tell whether the man who upset the cask was a full-grown man, as, from where he was standing, he could not see him at all. This version of the accident, given by these two witnesses, is corroborated by the testimony of the foreman of the stevedore's gang and at least two of the stevedores themselves. O'Donnell, the foreman, thus describes the accident: "After I got the stage up, I used short wood to chock it, and the 2nd mate of the ship jumped down to see how much short wood I was using. He came down to see whether I was using too much. He stood a minute and said it was all right. He started to climb up the forward stanchion of the forward hatch. He got up as far as the combings, when he put his hand over and sung out to a boy, to the best of my knowledge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand, put it under his foot to help him over, and I heard somebody halloo 'under,' and when I looked down the hatch I saw this man laying on the floor of the ship—that is, Jensen." On cross-examination, he reaffirmed the statement that the mate (meaning the 2nd mate) was in the between-decks. He was unable, however, to say who it was that went forward to help the mate up, as he was in the between-decks. Martin Ryan, one of the stevedores, testified that he was in the lower hold, tearing up the oil stage, and he relates what he saw of the accident, as follows: "All I saw, I saw the second mate climbing

up from between-decks on the upper deck, under the gallant forecastle. The next I heard was, 'Look out below.' I jumped into the wing of the vessel to get out of the way, and I looked around and I saw the keg laying there and Jensen laying down." Chris Nelson, another of the stevedores, stated that he was in the between-decks, helping O'Donnell, the foreman. In answer to the question: "State all that you know of the accident," he replied: "There was no ladder in the hatch. The second mate came down the stanchion, sliding down on the stanchion, and he went up the same way, and as he went up this keg came down. He hallooed to one of the boys or young men belonging to the ship to help him out of the hatch, and Mr. O'Donnell, the foreman, helped him up, and the keg came down, and that's all I know." He admits on cross-examination, that he didn't see who it was that came to the assistance of the second mate. In reply to the question, put to him on cross-examination: "Did you see that keg before?" he replied: "Yes, sir, I saw it that forenoon. A young man was sitting painting it, and set it there to dry on the hatches. Q. Which end was it on? A. On the forward part of the hatch covering, on the port side." This constitutes the testimony, on the part of the libelant, indicating how the accident happened. As against this evidence, the second and third mates testified, substantially, as follows: Edward Peterson stated that he was the second officer of the vessel at the time; that when the libelant was injured, he (the 2nd mate) "was up alongside the hatch coming on the main deck;"

that the third mate was a little away from him. He thus describes the accident: "There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man." . . . . Q. "Who was the man that trod on this hatch cover?

"A. One of the stevedore's men. Which one it was I cannot say.

"Q. It was one of the stevedore's men, but you do not know his name?

A. No, sir; I did not take particular notice which one it was.

Q. Were any others of the stevedore's men under neath the top gallant forecastle except this one that trod on the hatch?

"A. I don't think there was.

"Q. What was this stevedore's man doing when he trod upon the hatch cover?

"A. I don't know exactly what he was doing. He just happened to come along and touch the hatch cover. Either he was going down the hatch, or what he was going to do I don't know. I know he just happened to touch the hatch cover the least mite."

On cross-examination, he testified as follows:

"Q. What were you doing at the forward hatch at that time?

"A. I was not doing anything. I was doing something under the topforecastle, and stopped to look down in the hatch to see what they were doing. We were taking in cargo and I looked down occasionally while they were taking in cargo. . . . . .

"Q. What were you doing under the forecastle head?

"A. I don't exactly recollect what I was doing. I had underneath there two boys, and the third mate, finishing something I was doing. I cannot recollect now what I was doing. There is always something."

Henry Hannum testified that he was the third mate of the vessel; that at the time the libelant was injured, he was standing under the topgallant forecastle, about three feet away from the forward hatch, and that he was looking right over the hatch; that one of them trod on the hatch, and the hatch tilted and the keg rolled off and fell down; that one of the stevedore's men trod on the hatch; that he thinks one of the boys (connected with the ship) was also under the top-gallant forecastle besides the second mate and himself; that he thinks that the man who trod on the hatch came out of the water closet; that he does not know the name of this man. This witness was subsequently recalled and deposed as follows: "Q. Just at and immediately before the time that the cask fell into the hold, by which Jensen was injured, had the second mate come up from the between decks? A. No, sir.

"Q. If just at the time that the cask fell into the hold, by which Jensen was injured, the second mate came up from the between decks through the fore hatch, could you have seen him? A. Yes, sir.

"Q. If any stranger from the shore had come in on the main deck under the top-gallant forecastle, and had asked the second mate to give him a piece of rope, in your opinion, would you have heard him? A. Yes, sir.

"Q. Did any person from the shore come on board the ship just before the accident happened, under the top-gallant forecastle, and request the second mate, or any other person there, to give him a piece of rope?

A. No, I didn't see anybody, and there was nobody there.

"Q. Did any person belonging to the ship, as one of the company of the ship, tread on the hatch covers, by reason of which the cask by which Jensen was injured was precipitated into the hold?

A. No, sir." . . . . "Q. A witness by the name of John F. Fitzgerald has testified in this case as follows: 'That at the time of the accident the mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he trod on that hatch.' Is that true? A. No. sir."

It is clear, from the testimony of this last witness and that of the second mate, that either the testimony of the witness Fitzgerald and of the person who accompanied him on board the vessel, as well as the corroboratory testimony of the foreman O'Donnell and of the two stevedores, is false, or else the testimony of the second and

third mates is absolutely untrue. After a careful consideration of the evidence in the whole case, I prefer to accept the testimony of the witness Fitzgerald, corroborated as it is by that of Gray, O'Donnell, Ryan and Nelson, as presenting the real state of facts. I reach this conclusion not for the reason alone that the number of witnesses on the part of the libelant is greater than that for the claimants, but, largely from the inherent probabilities and improbabilities of the two stories. In the first place, everyone connected with the stevedore's gang on that day was called by the libelant and not one of them stated that he was the person who trod on the hatch-cover. On the contrary, each one of them related where he was working at the time of the accident, and not one of them was on the main deck except the burden-tender (Jno. F. Davidson) and he testified that he was at the main hatch, not the fore-hatch, some 50 feet away, thereby precluding any inference that it might have been one of the stevedores who stepped on the hatch covers. On the other hand, it is a significant fact that the two young men or boys so-called, who, it was testified to by the second and third mates, were on board at the time and were connected with the vessel, were not called by the claimants; nor does it appear that any particular effort has been made to obtain their deposition although they remained with the vessel until she reached San Francisco, where the depositions of the second and third mates were taken. The captain himself admits that they remained by the ship some 3 or 4 days; that they were paid off the

third day after the ship arrived. Their testimony would have been most important, in dissipating any doubt as to who it was that stepped on the hatch cover; particularly in view of the fact that the testimony of the witnesses called for libelant, while it fails to identify specifically who it was that trod on the hatch cover, indicates that the person who did so was a young man. The very strong inference which naturally arises from this testimony, in view of the testimony produced on behalf of the claimants themselves that two young men were attached to the vessel and were then on board and, at the time of the accident, were quite close to the fore-hatch, is that this person must have been one of the two young men referred to. The failure of the claimants to call these two young men, and the explanation sought to account for this failure, are unsatisfactory and do not dispel the presumption raised against the claimants that the testimony of these witnesses, if produced, would have been unfavorable. This is a well-settled rule of evidence, not only in civil, but also in criminal, cases, as was said by Lord Mansfield in Blatch v. Archer, Cowp. 63, 65: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." Mr. Starkie, in his work on Evidence, vol. 1., 54, this lays down the rule: "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, fre-

quently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice." See, also, Com. v. Webster, 5 Cush. 295, 316; People v. McWhorter, 4 Barb. 438; Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. R. 181, 10 U. S. App. 640. In the last case, it was held that the failure to produce an engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evidence, instead of rebutting such inferences, would support them. The failure of the claimants to obtain the testimony of these two young men confirms my conviction that the person who ran to the assistance of the second mate and stepped upon the hatch cover was one of the young men or "boys," so-called, who belonged to the vessel and were on board at the time. It seems but natural that when the mate called for help, one of the young men who was under the topgallant forecastle, not very far away from the forehatch, should respond with such alacrity to his superior's call. I conclude, therefore, that it was one of these young men, and not one of the stevedores, who stepped on the hatch covers, upsetting the keg, and that in no view of the case can the act of tipping the hatch cover and causing the keg to roll into the hatchway be construed as the act of a fellow-servant. But it is immaterial, in my opinion, whether the person who stepped on the hatch cover was one of the young men connected with the vessel or whether it was one of the stevedores, if the act of placing the keg on the hatch cover to dry was a failure to observe

ordinary care or, in other words, was culpable negligence on the part of those connected with the vessel. For it is well settled that it is no defense in an action for negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was the efficient cause of the injury. 16 Am. & Eng. Ency. p. 440, and cases there cited. Shearman & Redfield, in their work on Negligence, (3rd ed) section 10, give the general rule as follows: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other even (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." Thompson, in his work on Negligence, vol. 11, p. 1085, says: "Where an injury is the combined result of the negligence of the defendant, and an accident for which neither the plaintiff nor the defendant, is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent." (Citing a number of cases in a note.) It is also another rule of the law of negligence that the employer is liable for the concurring negligence of himself and a fellow-servant of the injured employee to the same extent as if the injury had

been caused entirely by his own negligence. Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700; Chicago R. I. & P. Ry. Co. v. Sutton, 63 Fed. R. 394; Chicago St. P. & K. C. Ry. Co. v. Chambers, 68 Fed. R. 148, 153, and cases there cited. The same rule prevails in admiralty. The Phenix, 34 Fed. R. 760. In the case of City of Clay Center v. Jevons, 44 P. 745, 2 Kan App. 568, it was decided that where the plaintiff had not been guilty of contributory negligence, and the injury complained of would not have resulted but for the negligence of the defendant, a recovery may be had, notwithstanding the primary cause of the injury may have been an accident for which the defendant was not responsible. In Benjamin v. Metropolitan St. Ry. Co. (Mo. Sup.), 34 S. W. 590, it was held that where the plaintiff was injured by the tilting of the cover of a manhole maintained by the defendant in the sidewalk in front of his premises, the fact that an independent contractor, who delivered coal to the defendant, negligently failed to replace the cover properly, will not relieve defendant from liability, if the negligence construction of the cover directly contributed to plaintiff's injury. Under these rules of law, the important inquiry, manifestly, is whether the act, by those in charge of the vessel, in placing the keg on the hatch-covers to dry at such close proximity to the hatchway was negligence, and whether such negligence concurred with the accidental tipping of the hatch-covers to produce the injury to the libelant.

The claimants owed a duty to libelant, as one of the stevedore's gang, to provide reasonable security against

danger to life or limb. The Kate Camm, 2 Fed. R. 241, 245; The Helios, 12 Fed. R. 732; The Max Morris, 24 Fed. R. 860; The Guillermo, 26 Fed. R. 921; The Phenix, 34 Fed R. 760; Crawford v. The Wells City, 38 Fed. R. 47; The Nebro, 40 Fed. R. 31; The Terrier, 73 Fed. R. 265; Leathers v. Blessing, 105 U. S. 626. See, also, The Frank & Willie, 45 Fed. R. 494, where many of the authorities are cited. This duty is a personal one. Railroad Co. v. Baugh, 149 U. S. 368, 386; The Pioneer, 78 Fed. R. 600, 608. In Clerk & Lindsell on Law of Torts, pp. 370-376, it is stated that "the owner of premises owes a duty towrads those whom he invites there to take care to see that the premises are in a fit state of repair, and if owing to his omission to exercise care in this respect, bricks, or tiles or other portions of the structure of a building fall upon them, he is liable; similarly will he be liable if he negligently leaves some chattel, such as a bale of goods, delicately poised in such a position as to be likely to fall and injure them. . . . . To establish the defendant's liability, his negligence need not necessarily have been the immediate cause of the injury; provided it be a substantial part of the cause, he will be none the less liable because the injury may have been contributed to by the intervening negligence of a third person: Abbot v. Macfie, 2 H. & C. 744; Clark v. Chambers, 3 Q. B. D. 327."

While there is no direct testimony that the keg was placed on the hatch covers at such close and dangerous proximity to the hatchway by some one connected with the vessel, still the strong probabilities of the situation

and the natural and reasonable inference, to be drawn therefrom convince me that it was placed there by some person connected with the vessel. It is difficult to imagine how else it could have got there, for although every one of the stevedore's gang was called as a witness, not one of them deposed that he had placed it there; in fact, it did not belong to them; it was the property of the vessel and was used to contain drinking water. Nelson, one of the stevedores, testified that he saw a young man painting this identical keg the morning of the accident, "and set it there to dry on the hatches." The failure to call these two young men not only leaves us without their testimony on this point, but, under the rule of evidence heretofore referred to, raises a presumption against the claimants that their testimony, if produced, would have been unfavorable. As the witness Nelson has not been contradicted, I think it may safely be assumed that the keg was placed on the hatch covers to dry by the same "young man" who was engaged in painting it the morning of the accident and who was connected with the ship. Perhaps, the most significant circumstance, is the fact that it belonged to the ship. That this, under the circumstances of the case, was such negligence as to render the claimants liable for the consequential injury to libelant is, I think, clearly established by the testimony. It was certainly a dangerous place to put the keg to dry; it was dangerous to those working under the hatchway. The event itself demonstrates this feature of the case. The mere fact that loading was going on should have been suf-

ficient to indicate to those in charge of the vessel the danger of placing and leaving a small, empty keg, liable to be easily knocked over, on the hatch covers at such close proximity to the hatchway. The testimony shows that the hatch covers, three in number, were laid one on top of each other, and the topmost one was nearly level with the hatch combings. The risk, therefore, of the keg being tipped or knocked into the hatchway should have been apparent. And the negligence was all the more culpable, in that the hatch covers were somewhat curved, that is, there was "a little crown to the hatch," (testimony of the second mate) making the liability of a small, empty keg being tipped or overturned all the more imminent, and dangerous to those working under the forehatch. It was this negligence which was the real, efficient cause of the accident, and it was, in my estimation, such negligence that a man of ordinary experience and intelligence could, and should, have foreseen the results that probably might ensue. Sherman & Redf. on Negligence, (3rd Ed.), sec. 10.

Counsel for the claimants contends that there is not sufficient evidence of negligence to justify fastening any responsibility upon the claimants for the injury to the libelant, and that the latter has failed to prove any negligence on the part of those in charge of the vessel. It is undoubtedly true that, in actions for injury resulting from the negligent acts of others, the burden is on the plaintiff to make out a prima facie case of negligence, but it is also true that there is a class of cases where the act of injury itself, in connection with other facts and cir-

cumstances, sufficiently establishes that there was negligence to justify a judgment for damages. The general rule is well stated in Scott v. London Dock Co., 3 Hurl. & Colt, 596, 601, by Erle, C. J., as follows: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The case was on appeal in the Exchequer Chamber from a decision in the Court of Exchequer in making absolute a rule to set aside the verdict for the defendants and for a new trial. It appeared that the plaintiff, in an action against the Dock Company for an injury to him by the alleged negligence of the Dock Company, proved that he was an officer of customs, and that, whilst passing, in the discharge of his duty, in front of a warehouse in the dock, six bags of sugar fell upon him. It was held this afforded reasonable evidence of negligence to be left to the jury.

In Byrne v. Boadle, 2 Hurl. & Colt. 721, it appeared that plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop and seriously injured him. It was held that this was sufficient prima facie evidence of negligence for the jury, to cast on the defendant the burden of proving that the accident was not caused by his

negligence. Pollock, C. B., in delivering the opinion, said: "The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. . . . . Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall, without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them." In the case of White v. France, L. R. 2 Com.

Pleas. 308, it appeared that a bale of goods was left nicely balanced on the edge of a trap door and fell upon a passer-by. The occupier of the premises was held liable for negligence in this respect. In Briggs v. Colt, 4 Hurl. & C. 403, the plaintiff, going to a doorway of a house in which the defendant had offices, was pushed out of the way by his servant, who was watching a packing-case belonging to his master and was leaning against the wall of the house. The plaintiff fell, and the packing case fell on his foot and injured him. There was no evidence as to who placed the packing case against the wall or who caused it to fall. The court held that there was a prima facie case against the defendant to go to the jury. The same doctrine is thoroughly discussed and enunciated in the leading English case of Kearney v. London etc. Ry. Co., L. R. 5 Q. B. 411; s. c., affirmed, L. R. 6 Q. B. 759. The rule is the same in this country. An excellent statement of the law, as deduced both from the English and American cases, will be found in the case of Howser v. C. & P. R. R. Co., 80 Md. 146. All of the leading cases on the subject are reviewed or referred to by the court. There it appeared that the plaintiff, while walking in a footpath along the roadbed of the defendant, but not upon its right of way, was injured by half a dozen crossties which fell upon him from a gondola car attached to a train passing on defendant's road. It was held that these facts gave rise to a presumption of negligence on the part of the defendant, and the ruling of the trial court that upon the pleadings and the evidence

given to the jury by the plaintiff (the defendant not having given any evidence), he was not entitled to recover, was reversed and a new trial ordered. In the course of a learned opinion, Roberts, J., said: "Whilst the general rule undoubtedly is, that the burden of proof that the injury resulted from negligence on the part of the defendant, is upon the plaintiff, yet in some cases, 'the very nature of the action may, of itself, and through the presumption it carries, supply the requisite proof.' Wharton on Negligence, Par. 421. Thus when the circumstances are, as in this case, of such a nature that it may fairly be inferred from them that the reasonable probability is that the accident was occasioned by the failure of the appellee to exercise proper caution which it readily could and should have done; and in the absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it." The supreme court of California has also enunciated the same doctrine. Pastene v. Adams, 49 Cal., 87; Dixon v. Plums, 98 Cal. 384, 389. In Pastene v. Adams, it appeared that the defendants were lumber dealers, and that they had piled lumber carelessly so that the ends of the timber projected more than others into the gangways. While the plaintiff was walking close to the timbers, a stranger drove a team from the yard through the gangway to the street, and, in so doing, the wheel caught the end of the timbers and threw it down, and the plaintiff was injured thereby. In an action brought to recover damages caused by the falling of the lumber, it was held, substantially,

that if the lumber was thus carelessly piled up, the fact that it remained in that condition a long time before the injury and that the lumber was caused to fall by the negligence of a stranger were no defense; that the negligence of the defendant concurring with negligence of a stranger was the direct and proximate cause of the injury. This case is directly in point, not only on the general proposition of the claimant's liability for their negligence concurring with the accidental tipping of the keg, but also upon the point sought to be made by counsel for claimants that as the keg had lain on the hatch covers for some hours before the accident and nothing had happened, its presence there was not dangerous and was not negligence. In the case cited, it appeared that the lumber had been piled up and had lain in a dangerous condition for several months, yet the court held that this would make no difference. The case of McCauley v. Norcross, 155 Mass. 584, 30 N. E. Rep. 464 appears to be directly in point. The defendants were erecting a building. The plaintiff, a laborer employed by them, was working on the second floor of this building. On the third floor, some iron beams were so placed near an open hole in the floor that when the superintendent was passing by he inadvertently pushed one of the beams with his foot, which fell through the hole on the plaintiff below. It was admitted that the plaintiff was engaged in his regular occupation at the time, and that he was in the exercise of due care. The defendants requested the trial court to rule that, upon all the evidence, the plaintiff could not

recover. This the court refused to do, and submitted the case to the jury, which returned a verdict for the plaintiff. The only question presented by the bill of exceptions was whether, in any aspect of the case, there was sufficient evidence to go to the jury. The appellate court held that there was sufficient evidence of negligence to go to the jury and said: "Upon these facts, the jury might find that the iron beams were negligently so placed and left that one of them would be liable, from a slight inadvertent push of the foot of a passer-by, to fall through the hole. Being left in this condition for two or three days, the jury might infer a lack of due and proper superintendence. Allowing such things to be negligently left for so long a time in a position where they were likely or liable to be toppled over, and one of them to fall through the hole in the floor, would warrant a finding of negligence on the part of the superintendent in exercising superintendence." . . . . "If the beams were so left that one of them would be liable, as a natural consequence, from some intervening cause or agency, to be so moved that it might fall through the floor, the fact that an intervening act or agency occurred which directly produced the injurious result would not necessarily exonerate the defendants from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided

against by the superintendent. It might be found that the beams were negligently left near the hole in the floor, where they were likely or liable to be toppled over so that one them might fall through the hole, and thus injure some one below, and that this was the proximate cause of the plaintiff's injury, although some careless person came along and toppled them over." (Citing several cases.) See, also, Johnson v. First Nat. Bank of Ashland, 48 N. W. Rep. 712. But it is unnecessary to elaborate further on this feature of the case. The whole proposition upon the burden of proof is thus summed up in Shearm. & Redf. on Negligence, sec. 13 (3rd ed.): "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produced evidence sufficient to rebut this presumption. Though it is not every accident that will warrant an inference of negligence, yet it is not true that no accident will suffice for this purpose. If the plaintiff proves that he has been injured by an act of the defendant, of such a nature that in similar cases, where due care has been taken, no injury is known to ensue, he raises a presumption against the defendant, which the latter must overcome by evidence either of his carefulness in the performance of the act, or of some unusual circumstance which makes it at least as probable that the injury was caused by some circumstance with which he had nothing to do, as by his negligence. Under the facts and circumstances

of this case, and the authorities referred to, it is my opinion that the act of placing and of leaving the keg, previously described, on the hatch covers so close to the hatchway that it was liable to be knocked into the hold, and was in fact tipped over and did roll into the hatchway through an intervening cause or agency, was such negligence as to render the claimants, in view of the duty they owed the libelant as a stevedore on board the vessel, liable in damages for the injuries suffered thereby.

It is strenuously contended by counsel for claimants that the injury should be attributed to an inevitable accident, as the stepping upon and tipping of the hatch covers, which caused the keg to roll into the hatchway, was purely accidental, the injurious results of which, to libelant, could not be reasonably foreseen or apprehended. But this defense cannot be allowed where the negligence of the claimants has concurred with the accident which caused the injury to libelant. "In order to prove that an accident was inevitable, it is not always enough to show that, under the circumstances existing at the time, it could not be avoided. It must also be the fact that the defendant was not in fault in bringing about any of those circumstances." Shearm. & Redf. on Neg., sec. 5 (3rd ed.) As was said in Austin v. New Jersey Steamboat Co., 43 N. Y. 75; s. c. 3 Am. Rep. 663: "A party cannot avail himself of the defence of 'inevitable accident,' who by his own negligence gets into a position which renders the accident inevitable." Under the facts of this case, the defense of inevitable accident cannot

avail the claimants. Bridges v. North London Ry. Co., L. R. 62 B. 377, 391.

We next take up the question of damages. That the libelant was very seriously injured is clearly established by his own testimony and that of the physicians who testified. The severity of his injuries is not disputed. His skull was fractured by the blow, resulting in paralysis and permanent injury of a very grave character. It was testified that there was also a possibility of imbecility or insanity supervening as a consequence of the injuries he had sustained, and that his earning capacity had been entirely destroyed with no prospect of recovery. When injured he was 29 years of age and in good health. He was unmarried and his earnings amounted to three dollars a day as stevedore and longshoreman. I think that, under all the circumstances of the case, and, particularly, in view of the fact that his earning capacity has been destroyed, the libelant should be allowed the gross sum of $6,000. A decree in that amount will be entered in favor of the libelant, with costs.

[Endorsed]: Filed April 26th, 1897. Southard Hoffman, Clerk.

UNITED STATES OF AMERICA.

District Court of the United States of America, for the Northern District of California.

At the stated term of the District Court of the United States of America, for the Northern District of California, held in the city of San Francisco, on Thursday, the third day of June, in the year of our Lord one thousand eight hundred and ninety-seven. Present: The Honorable THOMAS P. HAWLEY, District Judge for the District of Nevada, assigned to hold the District Court for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,

vs.

SHIP "JOSEPH B. THOMAS," etc.
SAMUEL WATTS, et al.,
Claimants.

Decree.

This cause having heretofore been heard on the pleadings and proofs, and the advocates for the respective par-

ties having been heard, and due deliberation being had in the premises,

It is now ordered, adjudged and decreed that Jens P. Jensen, the libelant herein, do have and recover against the said ship "Joseph B. Thomas," and Samuel Watts and others, the claimants herein of said ship, the sum of six thousand dollars, damages by him sustained, by reason of the matters and things in his said libel alleged, together with his costs taxed at one hundred and ninety dollars, amounting in all to the sum of six thousand one hundred and ninety dollars;:

It is further ordered, adjudged and decreed that unless an appeal be taken from this decree within the time limited by law and the rules and practice of this court, (after due notice of this decree to the proctors of claimants,) that the stipulators for costs and value herein cause the engagements of their stipulations to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands, according to their said stipulations.

THOMAS P. HAWLEY,
Judge.

[Endorsed]: Filed June 3d, 1897. Southard Hoffman, Clerk.

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,
vs.
SHIP "JOSEPH B. THOMAS," etc.
SAMUEL WATTS, et al.,
Claimants.

Notice of Appeal.

To Jens P. Jensen, and Frank P. Prichard, his proctor:

You are hereby notified that Samuel Watts et al., claimants of the ship "Joseph B. Thomas," intend to and hereby do appeal from the final decree of the District Court of the United States in and for the Northern District of California, entered in the above entitled action, on the 3d day of June, 1897, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, June 4, 1897.

ANDROS & FRANK,
Proctors for Claimants.

Service of a copy of the foregoing notice of appeal acknowledged this — day of June, 1897.

Proctor for Libelant.

[Endorsed]: Filed June 4th, 1897. Southard Hoffman Clerk.

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,
vs.
SHIP "JOSEPH B. THOMAS," etc.
SAMUEL WATTS, et al.,
Claimants.

Assignment of Errors.

And now comes Samuel Watts and others, claimants in the above entitled cause, and assign errors in the decision and decree of said District Court therein as follows:

1. The Court erred in finding that, under the facts of this case as disclosed by the evidence, the libelant was entitled to a decree against said ship "Joseph B. Thom-

as," or the claimants thereof, in the sum of six thousand dollars.

2. The Court erred in finding that said libelant was, under the facts of this case as disclosed by the evidence, entitled to recover against said ship "Joseph B. Thomas," or the claimants thereof, any damages whatsoever.

3. The Court erred in entering a decree in favor of said libelant and against said claimants.

ANDROS & FRANK,
Proctors for Claimants and Appellants.

[Endorsed]: Filed June 4th, 1897. Southard Hoffman, Clerk.

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY.

JENS P. JENSEN,
Libelant,
vs.
SHIP "JOSEPH B. THOMAS," etc.
SAMUEL WATTS, et al.,
Claimants.

Petition for Appeal.

And now, by their proctors, Andros & Frank, come Samuel Watts et al., claimants of said ship "Joseph B. Thomas," and having filed with the clerk of the District Court of the United States in and for the Northern District of California with their petition for an appeal an assignment of errors, pray this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District Court in the above entitled cause, entered on the 3d day of June, 1897.

Dated at San Francisco, June, 1897.

ANDROS & FRANK,

Proctors for Claimants.

[Endorsed]: Filed June 4th, 1897. Southard Hoffman, Clerk.

(Style of Court—Title and Number of Cause.)

Order Granting Appeal.

On petition of Samuel Watts et al., claimants of the ship "Joseph B. Thomas," in the above entitled cause, it appearing that said petitioners have filed in the clerk's office of the District Court for the Northern District of California, an assignment of errors in said cause, it is or-

dered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in the above entitled action on the 3d day of June, 1897, in said District Court, be, and the same is, allowed.

Dated at San Francisco this 4th day of June, 1897.

THOMAS P. HAWLEY,

Judge.

[Endorsed]: Filed June 4th, 1897. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

Acknowledgment of Service.

The Western Union Telegraph Company.

* * * * * * * * * * * *

1062

Received at San Francisco, Cal.

Ch 325 Gn-Ws 19 Paid. 5:30 P.

Germantown, Pa., June 9, 1897.

Andrews and Frank,

320 Sansome St., San Francisco.

Service of notice, petition, allowance, appeal and assignment of errors acknowledged this 9th day of June, eighteen ninety seven.

FRANK P. PRICHARD.

[Endorsed]: Filed June 10th, 1897. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

(Style of Court—Title and Number of Cause.)

Bond on Appeal.

Know All Men by These Presents, that we, Samuel Watts, M. C. Mehan, W. J. Lermond, C. H. Washburn, J. T. Berry, William F. Hall, J. B. Thomas, C. C. Black, and J. F. Chapman, as principals, Joseph G. Levensaler and Louis T. Snow, as sureties, are held and firmly bound unto Jens P. Jensen in the sum of five hundred dollars, to be paid to the aforesaid Jens P. Jensen, his heirs, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 4th day of June, 1897.

Whereas, the above named Samuel Watts and others have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree in favor of the above named libelant, made and entered on the 3d day of June, 1897, in the above entitled action by the District Court of the United States for the Northern District of California, praying that said decree may be reversed.

Now, therefore, the condition of this obligation is such. that if the above named appellants shall prosecute their appeal to effect, and shall answer all damages and costs

if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

J. F. CHAPMAN. [Seal.]
SAMUEL WATTS.
M. C. MEHAN.
W. J. LERMOND.
C. H. WASHBURN.
J. T. BERRY.
WILLIAM F. HALL.
J. B. THOMAS.
C. C. BLACK. [Seal.]

By their attorney in fact,

J. F. CHAPMAN. [Seal.]
J. G. LEVENSALER. [Seal.]
LOUIS T. SNOW. [Seal.]

Witness: JOHN FOUGA.

United States of America,
Northern District of California. } ss.

Joseph G. Levensaler and Louis T. Snow, being duly sworn, each deposes and says that he resides in the Northern District of California, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities and property exempt from execution.

J. G. LEVENSALER.
LOUIS T. SNOW.

Subscribed and sworn to before me, this 4th day of June, 1897.

JOHN FOUGA,
Commissioner U. S. Circuit Court, Northern District of California.

This bond approved as to form and amount and sufficiency of sureties.

Dated at San Francisco, June 4, 1897.

THOMAS P. HAWLEY,
Judge of the United States District Court for the District of Nevada, assigned to hold the United States District Court for the Northern District of California, and holding the same.

[Endorsed]: Filed June 4th, 1897. Southard Hoffma Clerk.

Clerk's Certificate.

United States of America,
Northern District of California. } ss.

I, Southard Hoffman, clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and sixty-eight pages, numbered from (1) to (168) inclusive contain a full, true and correct transcript of the record in said District Court in the cause entitled "Jens P. Jensen, Libelant, vs. The Ship 'Joseph B. Thomas,' her tackle, apparel and furniture, Respondent," numbered 10452, made up pursuant to rule 52 of the rules of the Supreme Court of the United States of America.

And I further certify that the cost of said record, amounting to $96.70 was paid by the appellant.

Witness my hand and seal of said District Court, at San Francisco, this 26th day of June, A. D. 1897.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: No. 385. In the United States Circuit Court of Appeals for the Ninth Circuit. Ship "Joseph B. Thomas," Samuel Watts, et al., Claimants, Appellants, vs. Jens P. Jensen Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California.

Filed July 8th, 1897.

F. D. MONCKTON,
Clerk.

No. 385

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SHIP "JOSEPH B. THOMAS," SAMUEL WATTS, ET AL., CLAIMANTS,
Appellants,

vs.

JENS P. JENSEN,
Appellee.

BRIEF FOR APPELLANTS.

ANDROS & FRANK,
Advocates for Appellants.

United States Circuit Court of Appeals in and for the Ninth Circuit.

IN ADMIRALTY.

SHIP "JOSEPH B. THOMAS,"
SAMUEL WATTS et al.,
Claimants and Appellants,
vs.
JENS P. JENSEN,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

In this action the libelant seeks to recover damages for personal injuries sustained by him on the ship "Joseph B. Thomas," while he was engaged as a laborer in the service of a stevedore, who had been employed by the claimants to receive and stow the cargo of that vessel at the port of Philadelphia.

The cause was heard in the United States District Court for the Northern District of California, on proofs all taken before commissioners, and that Court entered,

in favor of the libelant, a final decree in the gross sum of $6,000. From this decree the claimants have appealed to this Court.

The libelant alleges that on the 11th day of April, 1892, the ship "Joseph B. Thomas" was being loaded at the port of Philadelphia by a stevedore who had, under a contract, undertaken to load her cargo. That the libelant was a laborer in the employ of said stevedore, and, on the day above mentioned, was in the hold of the ship, engaged as one of the employees of said stevedore, in the work of loading the cargo of said ship;

That between three and four o'clock in the afternoon of said day, while the libelant was lawfully at work in the hold of said vessel, a barrel fell through the hatchway of the vessel down into the hold where the libelant was working, striking him on the head;

That said barrel fell down said hatchway and upon the libelant in consequence of the negligence of the master and of those intrusted by the owners of said vessel with the care and management of the same;

That by reason of the fall of said barrel upon the libelant, he sustained permanent injuries to his health and body of a most serious character, and alleges damages in the sum of ten thousand dollars. (Libel, Art. 1, 2, 3, 4. Record, pp. 6-7.)

The claimants deny that any barrel fell through the hatch; aver that while the libelant, one of several laborers employed by the stevedore to stow the cargo of the

ship was engaged in that occupation in the hold of the vessel, a small keg which some one had placed upon the hatch covers, which were lying on the deck of the ship, fell therefrom through the hatchway into the hold, striking the libelant on the head and seriously injuring him.

That it was usual and customary for laborers employed by stevedores to load and unload vessels at the port of Philadelphia, to take off and put on, as occasion might require, the hatch covers of such vessels while being loaded.

That the laborers, among whom was the libelant, on the morning of the day on which the accident to the libelant occurred, took off the hatch covers of the fore hatch, and negligently and carelessly piled them up forward of the head ledge or forward coaming of the hatch, and that one of the laborers, a coservant of the libelant, trod upon or otherwise negligently interfered with said hatch covers, by reason of which, and also in consequence of the improper and negligent manner in which said hatch covers had been placed in position by some of the laborers, coservants of the libelant, they tipped and precipitated the keg into the hold of the vessel.

That the accident and injury to the libelant was occasioned and brought about solely in consequence and by reason of the negligence of the coservants of the libelant, or some of them, and not by reason of any supposed negligence of the claimants, or of any of them, or that of their servants, or of any of them. (Answer, art. 5; Record, p. 19.)

On the 11th day of April, 1892, the ship "Joseph B. Thomas," bound on a voyage from the port of Philadelphia to the port of San Francisco, was lying alongside of a wharf in the former port, and was taking in cargo for the port last named, which was being laden on board and stowed by a stevedore under a contract with the owners of the ship, and who, for this purpose, employed a gang of laborers, of which the libelant was one, working under the immediate supervision of a foreman. It was the business of these laborers when they stopped work for the day to put on the covers of the hatches in the main deck of the ship, through which the cargo was being lowered into the hold and into the between decks, and to take them off when they resumed work the next morning. There were three of these covers on the fore hatch, through which, at the time of the accident to the libelant, cargo was being taken and stowed below. This hatch was from six to eight feet square, and was situated under the topgallant forecastle, and directly under the hatch in the deck of this forecastle. These hatch covers were a little crowning or curved, and when taken off by the stevedore's laborers were piled one on another near the head hedge or forward coaming of the hatch, which was about twelve inches high. Unless these covers were properly piled, they were, if sufficiently disturbed, liable to tip or otherwise become displaced.

On the morning of the day on which the libelant was injured, some person placed a small empty keg on these hatch covers, where it remained until some time in the af-

ternoon, when some one—the claimants contend that it was one of the stevedore's men, and the libelant that it was one of the ship's company—trod or jumped on these covers, which so disturbed their position that this keg was thrown from them, and fell through the hatch into the hold where the libelant was at work, striking him on his head and seriously injuring him—which is the injury for which, in this action, he seeks to recover damages against the ship.

At the time of the accident to the libelant the ship had no crew. The captain and first officer were absent at their homes in the State of Maine. The only persons connected with the ship and then present were the second and third officers, the carpenter, steward, and two ship's "boys." None of these persons had anything to do with the reception or stowing of the cargo, or in performing any act connected with the same. This was the sole business of the stevedore and that of his servants, of whom the libelant was one.

The Court below found that the libelant was entitled to recover against the claimants, and entered a decree in the sum of six thousand dollars. From this decree the claimants have appealed to this Court.

POINTS AND AUTHORITIES.

Under this statement of the case, the questions to be considered are, therefore:

1. Was the accident to the libelant the result of negligence on the part of the coservants of the libelant, or of some of them?

2. Was it the result of the negligence of the servants of the claimants?

The position of the claimants is that the injury occurred from the immediate act:

1. Of a fellow-servant, one of the employees of the stevedore who was loading the vessel under a contract with the owners thereof, and over whom the claimants had no control; and

2. The proximate cause of the injury to the libelant was the fact that the hatch covers were piled one upon another, in such a manner that when this employee ran trod or jumped upon it, the cover tilted, overturned the keg, and it fell throught the hatchway into the hold.

The testimony of all the witnesses was taken by deposition, and was so offered in the District Court. Therefore, the case comes before this Court without such presumptions in favor of or against the weight of the testimony of any witness by reason of the opportunity given the Court below to observe him and to judge of his veracity or mendacity, his intelligence or his dullness.

See The Glendale, 81 Fed. Rep. 633.

The opinion of the Court below sets out a brief statement of the facts. After stating the contention of the parties, he concludes (p. 153): "The testimony is irreconcilably conflicting." He then proceeds thus:

"In this connection, the evidence of two witnesses not connected with the ship nor with the stevedore's gang, who happened to be on board the vessel at the time that the libelant was injured, is of great importance in en-

abling the Court to arrive, substantially, at the real state of facts. These two witnesses, as far as the evidence discloses, appear to be disinterested."

We shall set forth, more fully than is done in the opinion, the testimony of these two witnesses introduced on behalf of the libelant, and endeavor in each case to estimate its value, to indicate its weakness, and to endeavor to show that its importance has been overestimated by the Court below.

It will not be amiss to remind this Court of a preliminary principle to which the libelant is subject.

"The burden of proof, in an action upon negligence, always rests upon the party charging it. . . . . It is not enough for him to prove that he has suffered loss by some event which happened upon the defendant's premises, or even by the act or omission of the defendant. He must also prove that the defendant, in such act or omission, violated a duty resting upon him."

Shearman & Redfield on Negligence, 12.

It was then the duty of libelant to prove beyond uncertainty, that the immediate or proximate cause of the injury was the act of the claimants, or that of some person or persons for whose acts the claimants were responsible. We claim that the libelant has completely failed to make such proof. Our position we believe unanswerable, if it were based exclusively upon the testimony of the witnesses for libelant. We claim that he is held by the facts as testified to by them, and that he cannot claim any exemption from the effect of their testimony.

Another principle, for the application of which to the facts of this case we shall appeal, is, that claimants cannot be held for any injury which was not a result naturally and reasonably to be expected from the act of their employee, and could not have been foreseen.

Schaffer v. Railroad Co., 105 U. S. 249.

McClary v. Railroad Co., 3 Nebraska, 53.

We also believe that the rule laid down by Field, J., in the Nitro-glycerine cases, 15 Wall. 524, is applicable here. "The rule deducible from them [cases cited] is that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own."

Would the claimants have any cause of anxiety—would they be imprudent or incautious—if, while stevedores were employed in the hold of the vessel under the hatch, they should leave a single-headed, empty, four gallon keg sitting on the further end of a hatch cover, several feet distant from the hatch, and three or four inches below the level of the hatch coaming?

The two things to be first determined in this investigation are (1) the position of the keg which was thrown down the hold; (2) the person who caused the keg to be thrown down the hold.

In determining the first is involved the question as to how were piled the covers, on which the keg rested. These facts are undisputed by claimants. The libelant was one of a gang of stevedores engaged in loading the ship "Jo-

seph B. Thomas," at the port of Philadelphia, and was injured on the afternoon of April 11th, 1892, while at work in the lower hold of the vessel under the forward hatch. There was a gang of stevedores engaged in loading case oil. At the time of the accident, several of them, including the libelant, were at work in the lower hold under or near the forward hatch, engaged, for the most part, in tearing up a stage which had been put in the hold,in order to render the work of loading more easy; the foreman and two or three other men were in the between decks at the forward hatch; the burton-tender was on the main deck, and the engineer was on the wharf. The hatch covers, consisting of three pieces, had been taken off that morning by the stevedore gang, although it does not appear which of the men performed that service.

There were only six of the ship's company on board—the second and third mates, the steward, the carpenter, and two boys. According to the testimony of libelant's witnesses, the second officer was between decks, attempting to climb up the stanchion to the main deck, and called out for some one to help him over the hatch combing. At the main hatch, fifty feet distant, was a ladder, which was the usual mode of descent and ascent. (Testimony of Hannum, Transcript, pp. 138 and 147.) There appeared no reason why he should attempt to climb a slippery stanchion nine feet high, and thence over the hatch coaming, depending upon finding some one on the main deck to help him out, with a liability of falling twenty-five feet

(p. 50) into the hold if he failed, instead of taking the easy and usual way of the ladder.

We maintain that upon the testimony of libelant's witnesses alone, he was not entitled to a decree, and to the examination of their testimony we first ask the attention of the Court.

They do not, it may be noted, attempt to locate the third officer or either of the boys, the steward, or the carpenter.

In addition to these, it is claimed on behalf of the libelant, that there were on board two persons, entire strangers to the company—John F. Fitzgerald and William B. Gray—who came aboard to get a piece of rope.

It may be noted here, that it is very singular that not one of the other libelant's witnesses, the stevedores, testify to having seen either of these two men, nor is any stevedore asked concerning them. On the other hand, Hannum, the third mate, who was under the forecastle on the main deck at the time of the accident (p. 126), swears (p. 137) that there was no such person there, and that if any stranger from the shore had come on the main deck under the topgallant forecastle—for that is where the second and third mates were—and had asked the second mate to give him a piece of rope, he would, in his opinion, have seen and heard him.

Inasmuch as this is an appeal from the decree of the District Court, and the opinion of that Court, the basis of the decree, is made a part of the transcript of the record, and will certainly claim the careful attention and consid-

eration of this Court, it will be necessary for the appellants to respectfully point out what they conceive to be errors of that Court, as indicated in its opinion, when considering and weighing the testimony, we shall, in considering the various questions that arise out of the facts of the case, be guided, as nearly as may be, by the order pursued in the opinion of the Court.

I.

HOW THE COVERS WERE LAID.

On page 152, line 16, of the Transcript, the opinion says concerning them:

"They were piled one on top of the other forward of the forward hatch on the main deck, and, so far as the evidence discloses, were piled in the usual and proper manner. It is true that the second mate who testified on behalf of the claimants stated, that he noticed that day that the hatch covers were improperly piled up, but I am unable to accept this testimony uncorroborated by any other witness, as I seriously doubt the credibility of the testimony of the second mate in other material respects." We find corroboration of his testimony in the failure of every witness of libelant to deny its truth.

This Court will bear in mind that the vessel was practically abandoned to the stevedores, of whom Patrick O'Donnell was the foreman. No business whatever was being carried on in the vessel at that time, except stowing

the cargo. The stevedores took possession of the part of the vessel where they were engaged; they took off the hatch covers as part of their work, and laid them as they chose, undirected by any one connected with the ship. They, and not the persons connected with the vessel, determined the position the hatch covers should occupy, and in their hands so far was the complete management. They took off the covers and laid them near the hatchway, in what direction they chose, piled them evenly or unevenly, loosely or firmly, negligently or carefully, as they willed. They were the only laborers in the hatch beneath, and in themselves lay the responsibility of leaving the covers and maintaining them, in such a condition, that peril did or did not impend over them. Several of them testified as to how the covers were laid by them, but not one of them said that they were properly laid. Even the most important of them, Patrick O'Donnell, their foreman, confessed his ignorance as to how they were then, or were usually laid. He said (p. 54) that the covers were in two pieces, and when asked to tell the proper way of piling them, answered with simpleness (p. 55): "I suppose one on top of the other."

This Court can be properly informed of what the witnesses of libelant testified concerning the covers, their measurements and location, only by a full quotation of their testimony.

P. O'Donnell, the foreman of the stevedores, testified (p. 53), on cross-examination:

"Q. It was usual for your men to take the hatch coverings off, wasn't it? A. Yes, sir.

Q. You have no recollection how they were piled, except that they were forward of the fore hatch; that is all you know, is it not?

A. One on the top of the other; yes, sir.

Q. They would come up to about the level of the hatch coamings, I suppose?

A. Well, I don't think they would within about three or four inches."

Also, on cross-examination (pp. 53, 54):

"Q. Where were the hatch coverings?

A. Forward of the fore hatch on the main deck.

. . . . . .

Q. You have no recollection how they were piled except that they were forward of the fore hatch; that is all you know, is it not?

A. One on top of the other; yes, sir.

Q. They would come up to about level with the hatch coamings, I suppose?

A. Well, I don't think they would within about three or four inches.

Q. How high were the hatch coamings? A. I should judge about nine to ten inches.

Q. I mean the forward hatch coamings. A. Yes, sir.

Q. Was the hatch covering in two or three pieces? A. I think two.

Q. With ring bolts on the corner to lift them up by? A. Yes, sir."

Also, on redirect examination (pp. 55, 56):

"Q. Mr. Edmunds has asked you about these hatch covers, and the piling of them. Were they properly or improperly piled?

(Objected to.)

Q. How were they piled? A. One on top of the other.

Q. It has been testified to by one of the ship's witnesses that the hatch covers were not properly laid on the deck. Please state what you know about that, if anything?

A. I can't tell any more than one was laid down on deck and the other one on top of it.

Q. What was the proper way of piling those hatch covers? A. I suppose one on top of the other.

Q. Were they piled on this day in any unusual manner?

A. No, sir. We generally take off the after hatch first, and then the forward one on top, so that when you go to put them on, the forward one is easier to put on, and there is no chance for a man to fall down when he puts the after one on.

Q. Was there any other way of piling those hatch covers which would have rendered them any safer, that you know of?

(Objected to.)

A. Not to my knowledge, there wasn't.

By Mr. Edmunds—Q. I suppose you don't know now

positively just exactly how those hatch covers were placed, except that they were placed on top of each other, do you? A. No, sir; one on top of the other.

Q. That's all you recollect about it? A. Yes.

Q. You don't know specifically how it was done?

A. No, sir. I couldn't see on deck, of course."

He answered thus, as if he had no duty to observe them even while on deck.

This Court will notice that no man could have known less concerning the way the covers were laid than this foreman, and no witness could furnish testimony concerning them more valueless than his.

Hughes, a stevedore, testified (p. 59), on direct examination:

"Q. Do you know who took the hatch covers off that hatch that morning?

A. No, sir; I couldn't tell you. We very often take them off in the morning as soon as we start to work; but whether we did that morning or not I don't know. We always take them off and put them down level, just off the coamings—always clear of the coamings."

Chris Nelson, a stevedore, testified on cross-examination:

"Q. How many pieces were there in the hatch covering? A. Two.

Q. Those two pieces were laid on top of each other?

A. Yes, sir."

That witness could not tell correctly how many pieces of the covers there were.

John F. Fitzgerald testified on direct examination (p. 36):

"Q. Did these hatch covers project over the hatch, or were they alongside of the hatch?

A. They were forward of the hatch. They were taken off.

Q. Did the end of the hatch covers project over the hatch or not?

A. No, sir; forward of the hatch altogether. . . . . The hatch coverings sat forward of the hatch."

Also, on cross-examination (pp. 39, 40), he testified:

"Q. The hatch covering was made out of what?

A. I didn't examine that.

Q. Put alongside of the hatch? A. Put forward.

Q. Was there more than one or two of them?

A. I think there was two or three of them.

Q. That is to say, the hatch covering over the hatch was in two or three pieces? A. Yes, sir.

Q. When they took it off they put it down alongside of the hatch forward? A. Yes, sir.

Q. And piled them on top of each other; is that right?

A. One was on top of the other. I couldn't say how many was there.

Q. They were forward of the hatch opening? A. Yes, sir.

Q. But one part of them was lying alongside of the coamings?

A. There was a hole, and the hatches were taken off and set forward.

Q. Alongside of the hatch? A. Yes, sir.

Q. And the three hatch coverings, therefore, would come up a little higher than the coamings?

A. They would come about even."

Wm. B. Gray, the companion of Fitzgerald, testified, after giving his motive for coming on board, on direct examination (p. 98):

"The hatching was laying there; that is, the covering of the hatch was lying forward of the hatch."

"By Mr. Edmunds.—Q. Where were you standing, forward or aft of the hatch? A. Aft of the hatch.

Q. Which hatch was it? A. The forward hatch.

Q. The hatch covering was where? A. Forward of the hatch.

Q. Between decks, or on the spar deck? A. Between decks.

Q. You were standing on the deck above? A. Yes, sir; the main deck."

The counsel for libelant, evidently not quite satisfied with the truth of this testimony, returned to the subject (p. 100):

Redirect Examination

"By Mr. Prichard.—Q. Where did you say the hatch coverings were? A. Forward of the hatch.

Q. On which deck? A. The deck of between decks.

Q. Not on the same deck that you were?

A. No, sir."

We submit that the finding of the Court below that the covers were laid "in the usual and proper manner" is not sustained by this testimony. That libelant's witnesses indicate that they were piled in the manner usual with them is plain, and the inference so far seems correct. Not one of them testified with any distinct recollection concerning them. They were testifying a year after the accident. It is, moreover, no way likely that they observed how they were piled, or, if they did, that they had taxed their minds therewith. That, if piled, they were piled one upon another, is a matter of course, and needs no witness to say so; but that was not defining how they were piled.

O'Donnell, the foreman of the gang, was superintending the work of the stevedores—all the work they had to do. If he was superintending, he had the management of the things with which they had to do. The opinion of the Court below says (p. 152), that the covers "had been taken off that morning presumably by the stevedore gang." We think the testimony shows that fact conclusively. The stevedores, as Hughes had testified above, "always take them off." There was then a duty for them to see to it that they were properly laid, lest in case of their own negligence and of accident therefrom to either of them, they would lose recourse for damages by reason of their own contribution as coservants and as being the proximate cause.

O'Donnell testified that he "had no recollection how

they were piled, except that they were forward of the fore hatch," and "one on top of the other," and that he did not think that when piled they would come within three or four inches of the level of the top of the hatch coamings. His attention was called to the importance of the matter, and he was challenged by the question of counsel for the claimants, to say whether they were properly or improperly piled—whether there was a way by which they would be safer. He was saved from answering directly (p. 56), by the ready interposition of an objection by the counsel for the libelant, but his mind had been taxed to aid the Court to a knowledge of how they were piled, so as to determine whether they were properly or improperly piled,and when asked, immediately afterwards, how they were piled, he answered only, and thus, either evasively or stupidly (p. 55): "One on top of the other." He apparently did not know that there was a proper and improper, a safe and an unsafe, way to pile the covers. He did not dare to say that they were piled in "a proper manner." He was the head of the gang who were responsible for the method of doing it, and he gave the Court no information upon the point.

The other witnesses, Hughes, Nelson, Fitzgerald, and Gray, testified concerning the covers, but none said anything by which it could be judged whether they were piled in a proper or an improper manner. Hughes said they "put them down level, just off the coamings—always clear of the coamings," as if the point for him to establish was, to show they did not rest against nor touch the

coamings. But he did not say they were not loosely but firmly laid, so that they would not "wobble," nor necessarily tilt if anything were placed on them, and upset it, so as to fall off from them. Nelson swore only that "they were laid clear of the opening of the hatch—the fore part," but not a word that could suggest that they were laid in "a proper manner." Fitzgerald swore that they "sat forward of the hatch," were "made of wood," and that "one was on top of the other," and would come about even with the coamings, but gave no idea of how they were piled one on another.

Gray testified that "the covering of the hatch was laying forward of the hatch . . . . between decks." He located them on a deck below the main deck, where no one else did.

Thus it is clear, that there was no word from any of these witnesses as to whether they were laid properly or not. Not one of them testified that the covers lay firmly or loosely—in fact, nothing from which it can be inferred that the covers were properly piled, or to aid the Court to learn how they were laid. These were all the witnesses of libelant who testified concerning the location and piling the covers, and we believe we have given every word they uttered on the subject; and we submit that in finding that the covers were laid "in a proper manner," the Court below was in error.

If they were improperly piled, the blame attaches to his fellow-servants. If they were properly piled, then that tends to defeat any theory of libelant that it was negligence on the part of the person who left the keg upon the

top of one of them.

Libelant claims to have taken the testimony of every one of the stevedores. If this be so, they were all allowed to go, including the one who upset the keg, without interrogating any one of them concerning this very important fact in the case.

On the other hand, we quote with entire reliance upon his title to credence, the testimony of Edward Peterson, the second mate, a witness in behalf of claimants. He was distrusted by the Court below, but the basis of that distrust was not specified. He did not appear before the Court, and we submit that the reasonableness of his testimony is the criterion of its truth, as well as of that of the witnesses of libelant.

Peterson testified concerning the hatch covers, on page 115, as follows:

"Q. How many hatch covers were there?

A. Three.

Q. Were they crowning at all?

A. Yes, sir; a little crown to the hatch."

Also, on cross-examination (pp. 118, 119):

"Q. How is that hatch cover divided; into how many pieces? A. Three parts.

Q. How high are those parts each. How thick?

A. Each is about four inches.

Mr. Andros.—Q. Four inches high?

A. Yes, sir, four inches.

Mr. Holmes.—Q. How much of a crown is there to them? A. Not much, just a little.

Q. Hardly perceptible to the eye?

A. Yes, sir; you can see it.

Q. Is it not a fact that when these three hatch covers of the forward hatch are piled, the one on the other, the lower one being flat on the deck, that they stand solid?

A. They stand pretty solid; yes, sir. One of them is laid on the other.

Q. Don't they stand absolutely solid?

A. They stand solid enough so that they would not do any damage.

Mr. Andros.—Q. That is when they are piled down as they ought to be?

A. Yes, sir; when they are piled down as they ought to be. There is a ring bolt in each corner of the hatch to lift them with, and when those hatches are not laid down properly they will wabble.

. . . . . .

Q. Did you see them taken off that morning?

A. No, sir; I did not see them taken off that morning. I did not see exactly when they took them off. I see the way they were laying and I cautioned the foreman stevedore many a time to lay them hatches down as they ought to be, because I said some one will get hurt yet the way you are throwing them down.

Q. You are not speaking of the forward hatch covers?

A. Yes, sir.

Q. Did you caution him that particular day?

A. No, sir; not that particular day, but several times I done it.

Q. You did not see who took them off that morning?

A. No, sir. I know the stevedore's men took them off. My men did not take them off.

Q. You do not know that from the fact that you saw who took them off or not?

A. No, sir; I did not see.

Q. Before this accident that day had you noticed that these covers were not properly laid on the deck; this particular day and these particular covers?

A. Yes, sir, I did. I see the way they were laying, but it was so usual to see them that way nearly all the time. When I had time to do it myself I altered them.

Q. Why did you not alter them that day?

A. I had not time to do it, and it was not my place to do it.

Q. How long would it have taken you to do it?

A. It would not have taken long to do it.

Q. Would it not have taken about a small part of a minute?

A. About a couple of minutes, but I did not happen to take any particular notice of it."

This witness was the chief officer of the vessel present at that time. For what reason the Court below distrusted him is not perceptible to us. We submit that the witness is wholly credible.

In the first place his testimony is no way improbable, but is every way reasonable on its face. The witness was unusually frank, as apparently having nothing to conceal.

Second.—He was the first witness called to testify in

the case, testified specifically and strongly adverse to the libelant, and thereby challenged him to produce his whole cohort to deny the truth of anything that he said. No witness denied specifically anything that he said.

The accident had occurred on the 11th day of April, 1892, in the port of Philadelphia, and the vessel had remained at that port until the 20th or 21st of that month. (Transcript, p. 111.) She had arrived at San Francisco on the 19th day of September, 1892. The libel herein was filed on the 10th day of October, 1892. His deposition was taken in San Francisco on the 17th day of the same month, a week afterwards, and two weeks before the answer. No witness on behalf of the libelant had testified. Peterson, this witness, could have had no communication with any of the stevedores who lived in Philadelphia, and had therefore no knowledge of what any person in Philadelphia would testify. He testified unequivocally, clearly, and without variation, save in one or two cases where he had answered without sufficient thought, where he unhesitatingly withdrew his answer and corrected his testimony—an incident which in itself affirms his honesty and veracity.

Third.—By this testimony, directly critical of the methods of the stevedore, if not true, he would naturally expect he would be contradicted by perhaps more than one witness, and possibly thereby his evidence be rendered untrustworthy. Those circumstances insure the honesty and veracity of the witness. His own confidence in his

truth invites the confidence, and not the distrust of this Court.

The testimony in behalf of libelant was taken in Philadelphia in the latter part of February, 1893, and in the latter part of April, 1893, a year after the event. No testimony of witnesses on behalf of the libelant was taken until the last part of February, 1893 (Transcript, p. 80), or over four months later than Peterson's. It does not appear that the attention of any witness on behalf of libelant was directed by his counsel to this testimony of Peterson, and no one of libelant's witnesses contradicts his specific statements. If true, his testimony that although the covers had each a ring bolt in a corner, and were slightly crowned, yet, if they were laid properly, they would "stand pretty solid," was important enough to be contradicted, if it was not true. If it was not true that on previous occasions, having seen how the stevedores "were throwing them down," not carefully piling them up, he had "cautioned the foreman stevedore many a time to lay them hatches down as they ought to be, or some one would get hurt," the deposition of Patrick O'Donnell would have shown that the coverings were not carelessly thrown down, and that his attention was not called to it, and he would have directly and specifically denied it in toto. But neither O'Donnell nor any other witness contradicted this exceedingly important testimony, and we submit that with an opportunity to contradict it, and a failure to do so, the testimony, in itself not untrust-

worthy, nor unreasonable, is by that failure strengthened beyond doubt of its veracity.

And, in this connection, it will not be amiss to say that under the circumstances, if there was any part of Peterson's testimony which the libelant wished to contradict, it was not sufficient for counsel simply to merely give a different version of the event, but the only proper method of contradiction would have been by calling the witness' attention to what Peterson had already testified, and giving an opportunity to directly contradict him. If he wished to impeach the witness directly, he should have done it according to the mode which prevails in the courts of common law, and which is direct, unequivocal, and unevasive.

We believe, then, that we have a right to claim that it was not proved that the hatch covers were properly laid, but that they were loosely, improperly, and carelessly laid, through the neglect of the stevedores and their foreman, whose attention had been called to their usual method of throwing them down without regard to danger, and who had been warned of the consequences—which the superintendent did not deny.

II.

WHAT IT WAS THAT FELL.

We take no exception to the finding in the opinion of the Court below as to the location of the keg, so far as it goes. We shall, however, call the attention of this Court

to further details omitted in the opinion. Says the opinion (pp. 152, 153):

"The hatch coamings were about 9 or 10 inches high, and the covers, piled one on top of the other, were nearly flush with the hatch coamings. A keg, belonging to the ship, which had been freshly painted, was placed by some one on these hatch covers, to dry. This keg was knocked over into the hatchway and, in its fall, struck the libelant on the head, inflicting some very severe injuries. . . . . The libelant was in the lower hold, under the forward hatch, where he had a right to be, and was then in the discharge of his duties as one of the gang of stevedores.

The libelant contends that he was injured by reason of the negligence of those then in charge of the vessel in placing the keg on the hatch cover, at such close proximity to the hatchway, into which, if accidentally jarred or moved, it was liable to roll or fall, to the danger of those of the stevedore's gang who were working below under the hatchway."

It is important, then, to examine the testimony to determine what it was that fell and injured the libelant.

The testimony of claimant's witnesses, Edward Peterson, the second mate, and Henry Bannum, the third mate, was first taken; it is that on the truthfulness of which claimants rely; it is that which, having been taken several months before that of the witnesses for libelant, where in particulars it is not directly contradicted by that of the libelant, and where it is not in itself incredible, we claim is to be accepted as entirely true. We may

remind the Court that the fact that the testimony of claimants was not offered at the hearing until after that of libelant, does not in this case demand that claimants shall contradict specifically that of libelant. It is a case in admiralty, heard upon depositions entirely. Those of claimants were taken first, and thereof libelant had knowledge. If anything in those depositions was not true, it was the duty of libelant's witnesses to specifically contradict it—not the duty of claimant, after his witnesses had already given their version of the event, to assume the position of specifically contradicting the testimony of libelant's witnesses.

The testimony in behalf of libelant is as follows:

Fitzgerald, the first witness called by libelant, first said (p. 35), that a young fellow "tread on that hatch, and the hatch upset the barrel, and the barrel fell down in the hold." He then made one correction by adding: "It wasn't a barrel; it was a keg." This witness gave no further idea of what fell; no measurements, nor dimensions, no suggestion of its size, or weight, or condition, or shape.

Patrick O'Donnell testified (p. 47) that "it was a keg about the size of a vinegar barrel or a cider barrel. They generally use them for a water cask in the forecastle. I should judge about two feet high." This testimony leaves the matter indefinite, but so far as these two witnesses are concerned, it was so large that it might, properly, have been called a barrel.

Ryan (p. 57) gave no description except in saying: "I saw the keg laying there and Jensen laying down."

McLean (p. 65):

"Q. State all you know about the accident.

A. We were taking up the stage of case oil—clearing the hatch up; we were all working there together. I saw the barrel come down, and I suppose it came off the upper deck; it hit this man and knocked him down."

Then the counsel for libelant encouraged the idea that it may not have been simply a keg, but was a barrel, by his next interrogatory (p. 66):

"Q. Had you ever seen that barrel before?

A. I don't suppose so; I might, but not exactly to take any notice of it."

Sprogel testified (p. 67): "How the keg came to come down the hold I couldn't say, but it was hallooed from above, 'Under below!' Not knowing who did it, of course I jumped one side, and this gentleman tried to do the same thing, but the result was he got the keg upon his head. Whose fault it was, or anything like that, I can't say."

Chas. O'Donnell testified (p. 67): "All I know about the accident is that the man that was hurt was about two feet from me when the keg came down."

Hans Nielson (p. 69), said he "saw the keg come down."

John Brown testified (p. 70): "I saw the keg come down and strike this gentleman."

Hendrickson (p. 73) "found Jensen laying at the bottom of the vessel and the keg rolling off of him."

These witnesses give no further idea of the size of what

fell. They all testified on the same day with Fitzgerald and Patrick O'Donnell, and simply echoed the word "keg."

Wm. B. Gray testified, on page 98: "The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the coamings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and threw the cask up in the air, and it went down in the hold. Mr. O'Donnell was helping the mate."

Charles King testified (p. 102): "As I came back for another armload, I happened to see a cask come down the hold and I hallooed."

From this testimony of witnesses for libelant, it is impossible to conjecture what fell. According to the last two witnesses, it was as big as a cask; according to O'Donnell, the foreman, it was a barrel. In the course of the testimony some one had called it a keg, and the same word dropped, parrot-like, from the mouths of the other stevedores. It would seem to be a matter of importance as determining in part a question of negligence, or ordinary prudence. The two witnesses, Fitzgerald and Gray, whose testimony in other respects was deemed by the Court below (top of page 154) "of great importance," swear it was a barrel or keg, or cask. Their testimony in this single matter betrays such heedlessness in giving testimony as, if it should be found to be a characteristic

of their whole testimony, will render it not only not important, in the sense of the opinion, but absolutely untrustworthy; and, if untrustworthy, then only so far of importance as to persuade the Court of the untrustworthiness of all the testimony of those witnesses, and thereby induce this Court to wholly disregard it on this and on all other points.

Peterson, the second mate, a witness for claimants, testified (p. 112): "There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man."

And on page 114:

"Q. What sort of a keg was this?

A. A small pickle keg. There used to be pickles in it. The keg I should judge holds about four gallons."

If this witness were not trustworthy, he might also have testified that it was a barrel or a cask that fell, and, if so, have persuaded the Court that so much force would have been required to upset it, that the question of negligence in placing it in its position could never have been raised. But he told the fact as it was, and with the same frankness which characterizes his whole testimony.

Peterson testified, also on cross-examination, concerning it (pp. 122, 123):

"Q. Was the keg empty or full? A. No, sir; there was nothing in it.

Q. How do you know that? A. I could see it when it fell.

Q. Did it have its cover off? A. Yes, sir; no cover on.

Q. One of its heads off? A. Yes, sir; one of the heads was off. The hoops had been painted.

Q. You say it was a pickle keg? A. It had been a pickle keg, but used at the present time for fresh water to drink in the room.

Q. It belonged to the vessel? A. Yes, sir."

And on page 125:

"Mr. Holmes.—Q. How tall was this keg?

A. It stands about that high (illustrating).

Q. Give it in inches. A. I should say about sixteen inches."

Henry Bannum, third mate, said (p. 128): "It was a pickle keg. I think it was one of these small pickle kegs."

The testimony of these two witnesses from the ship determined that which could not be determined from the testimony of libelant's witnesses, that it was nothing like a barrel or a cask, a "keg about the size of a vinegar barrel or a cider barrel," but only a small keg, about sixteen inches high, with only one head.

III.

THE PROXIMITY OF THE KEG TO THE HATCH.

The opinion of the Court below states (p. 153): "The libelant contends that he was injured by reason of the

negligence of those then in charge of the vessel in placing the keg on the hatch cover at such close proximity to the hatchway, into which, if accidentally jarred or moved, it was liable to roll or fall, to the danger of those of stevedore's gang who were working below under the hatchway."

Thereafter, the Court only partially reviews the testimony touching the position of the keg, but does not anywhere find exactly what that position was, except that it was, quoting the testimony of Fitzgerald on page 154: "Standing right on the corner of the hatch"; and that of Gray (page 155), that "the covering of the hatch was lying forward of the hatch and the cask sitting on the covering of the hatch"; and that of Nelson, on page 157, that it was "on the forward part of the hatch covering on the port side."

On pages 166-167 of the opinion, the Court thus expresses itself: "While there is no direct testimony that the keg was placed on the hatch covers at such close and dangerous proximity to the hatchway by some one connected with the vessel, still the strong probabilities of the situation and the natural and reasonable inference to be drawn therefrom convince me that it was placed there by some person connected with the vessel."

The Court thus fails to define how close to the hatchway the keg was placed, save by the testimony of these witnesses of libelant, which does not define it, and, assuming that the testimony shows that the keg was placed close to the hatchway, hastens to a conclusion as to the person who placed it there.

But we deem it material to determine how close to the hatchway the keg was placed, and for that purpose must inquire (1) the number of covers; (2) their dimensions; (3) and in what direction they were laid, whether fore and aft, or athwart ships. The position of the keg will then be defined. The libelant, on whom the burden of proof rests, has failed to furnish the evidence needful, but much more clearly defines it than appears to have been noticed by the Court.

To determine this and the other questions arising out of it, by true answers to which only can a proper determination hereof come, we feel called upon to make the examination of the testimony of libelant's witnesses minute and exacting. We shall thereby partly show that libelant has not proven by them the allegations of his libel, and partly demonstrate the ignorance of his witnesses and their inability, or disinclination, to instruct this Court in many particulars which, though taken singly, might each be unimportant, yet taken together indicate the true characters of the witnesses. Therefrom we believe we shall have a right to claim that the testimony to sustain this suit was a late afterthought in behalf of libelant, and has been sought to support the action from witnesses who have not testified truly from memory, but from their imaginations; that those who were stevedores were unable to give testimony of sufficient weight to support the libel; that the two witnesses, J. F. Fitzgerald and Wm. B. Gray, were either not on board the vessel at the time of the accident, or if they were, were not in a po-

sition to observe, or took not sufficient notice to be able to testify to facts truly and fully enough to inform the Court; and that their story bears all the earmarks of a fabrication, in that, except in one or two general matters, their narratives are irreconcilable, each with the other, and with the testimony of other witnesses for the libelant. It is, therefore, not a wonder to us that the Court below said (p. 135): "The testimony is irreconcilably conflicting." It seems the more singular that it should be so, inasmuch as the testimony of claimants' witnesses had been for several months before them, and if the narratives of the two officers which corroborated each other were not true in every particular, the libelant's witnesses should have, and would have, in every particular contradicted them, but have in every respect failed to do.

We call the attention of the Court to the following testimony:

Fitzgerald (p. 35), testified at first:

"Q. Where was the keg standing at the time of the accident?

A. Right at the corner of the hatch."

By this answer the Court below confesses (pp. 154 and 161) to having been guided to its decision. But this answer was not true, as we shall show: (1) The testimony as to the number of covers is as follows: Fitzgerald testified (p. 391):

"Q. Was there more than one or two of them?

A. I think there was two or three of them.

Q. That is to say, the hatch covering over the hatch was in two or three pieces?

A. Yes, sir."

The witness did not know.

O'Donnell, the foreman, testified (p. 54):

"Q. Was the hatch covering in two or three pieces?

A. I think two."

That witness did not know.

Nelson testified (p. 61), on cross-examination:

"Q. How many pieces were there in the hatch covering? A. Two."

He swore without knowledge.

From this testimony, if these witnesses of libelant are to be implicitly trusted, there were but two coverings. If there were but two coverings, when they were piled they would not come so near to the level of the top of the hatch coaming as if there were three.

Peterson, the second mate, is asked and testified freely (p. 115):

"Q. How many hatch covers were there?

A. Three."

This testimony is true, and was the only source of knowledge from which the Court below found (p. 152) that the hatch covers consisted "of three pieces."

(2.) The location of the keg depends, according to the previous testimony of libelant's witnesses, upon the dimensions of the covers; for they swore that the keg was on "the forward end of the covers," and the covers were forward of the forward hatch.

On page 154 the opinion, in quoting the testimony of John F. Fitzgerald, to locate it, quotes only his statement that the key was standing "right on the corner of the hatch." The witness thus begun his story, and begun it badly, by thus testifying carelessly and not truly (p. 35), but he overcame the effect of it by his answer to the next interrogatory of counsel for libelant, who quietly ignored that answer, and, in order to have him testify correctly, asked (p. 36):

"Q. What part of the hatch covers did the barrel set on? How close to the hatch was the barrel?

A. That I couldn't say; I never measured those hatches, and I don't know how wide they were. I don't suppose they are more than about four feet anyhow, if they were that. The hatch coverings sat forward of the hatch, and this barrel was sitting on the port forward end of the hatch covering."

This answer sets completely aside the answer which appears to have defined the location to the Court below, and admitted so far for the libelant, that the keg was four feet away from the hatch. The location was apparently defined to him by the length of the covers, and they were fixed by the width of the hatch. He had "never measured those hatches," but he did not "suppose" they were more than about four feet. Plainly, then, according to his testimony, the distance being measured by the length of the covers, if they were six feet long, the keg was six feet from the hatch. The distance was the length of the

covers. He more particularly defined the location of the keg by testifying on cross-examination, on page 40:

"Q. This barrel or keg was set on the other end of the covering away from the hatch? A. Yes, sir.

Q. The end away from the hatch? A. Yes, sir."

He thus completely changed the location of the keg from being "right on the corner of the hatch," to being as far away from the hatch as the length of the covers—the "other end"—"away from the hatch."

P. O'Donnell partly corroborated this witness by saying (p. 53):

"Q. Where were the hatch coverings?

A. Forward of the fore hatch, on the main deck." That deck is different from Gray's.

Chris. Nelson testifies (p. 63):

"Q. Did you see that keg before?

A. Yes, sir. I saw it in the forenoon. A young man was sitting painting it, and set it there to dry on the hatches.

Q. Which end was it on?

A. On the forward part of the hatch covering, on the port side."

Davidson, the burton tender, whose position was at the fore hatch, through which they were working, testified (p. 69):

"Q. You did not see the barrel?

A. No, sir. If I had seen it there I would have taken it away."

This would seem to verify the testimony of those who have already sworn that it was not near the hatch. But his claim of virtue has raised suspicion in our minds, which we shall later express to the Court.

Gray testified (p. 98): "The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch."

On cross-examination, having testified (p. 99), as before quoted, that the coverings were forward of the hatch "between decks," his knowledge is again tested on redirect (p. 100) thus:

"By Mr. Prichard.—Q. Where did you say the hatch coverings were? A. Forward of the hatch.

Q. On which deck? A. The deck of between decks.

Q. Not on the same deck that you were? A. No, sir.

Q. Where was the barrel? A. It was on the deck between decks."

This witness thus created confusion. He had moved the barrel from the main deck to between decks, where only P. O'Donnell, Nelson, and King were located according to the testimony of the stevedores already quoted. If he is truthful, all the other witnesses are in error. If he is untruthful, he shows that his testimony is not to be trusted in any other respect. We think he was untruthful, and that in summarizing his testimony later and comparing it with that of others, it will be found to sustain the theory of claimants concerning the worthlessness of his whole testimony.

But other testimony aids us to learn how far the keg was from the hatch. Chris Nelson testified, on cross-examination (pp. 62, 63):

"Q. How wide do you think those hatch coverings were? A. About six feet, I guess.

Q. Then the keg would be about six feet away from the hatch coamings, wouldn't it?

A. No, sir; there are two hatches. The two coverings were laid on the fore part of the coamings—the fore part of the hatch, close by the hatch—and the keg was setting on top. It was painted and set there to dry.

Q. How big was the hatch?

A. It was pretty near square; I guess, about six feet.

Q. How many pieces were there in the hatch covering?

A. Two.

Q. Those two pieces were laid on top of each other?

A. Yes, sir.

Q. That would make it about four feet away from the hatch?

A. They were laid clear of the opening of the hatch—the fore part."

Though somewhat indefinite, it is plain that this witness intended to locate the keg at a distance of from four to six feet from the hatch.

Peterson, the second mate also testified (p. 112), that the keg was standing "on the port corner of the hatch cover," and (p. 118), that he thought the forward hatch "is about six or eight feet square."

The testimony of all the libelant's witnesses, that the keg was on the forward end of the covers, corroborated

by that of the second mate, is so far conclusive of its location.

(3.) The direction in which the covers lay was fore and aft the deck. One end was near the hatch coaming, but not against it. Hereof Fitzgerald testified (p. 36), as above, that the covers did not project over the hatch, but were "forward of the hatch altogether," and afterwards repeated that statement.

Hughes testified (p. 59) that the covers were "always clear of the combings."

Nelson (p. 63): "They were laid clear of the opening of the hatch—the fore part."

The other end of the cover, must have been away from the hatch coaming.

If the covers had lain athwartships, there would have been no end "away from the coaming." They would have lain parallel to the coaming and very near to it, though clear of it. The testimony of Fitzgerald (p. 43), that "this barrel or keg was set on the other end of the covering, away from the hatch," and (p. 36), not "more than four feet anyhow," of Nelson (p. 62), that it was on the "forward part of the hatch covering," and might be four or six feet off, is conclusive that the covers were piled forward from the hatch, and nearly at right angles to the hatch coaming. Otherwise there would be no forward part, for they would lie, not exceeding two feet in width along, parallel to the coaming, and could not be six feet nor four feet distant. The other end of the covers and

the keg sitting thereon, therefore, must have been from four to six feet distant from the coaming.

IV.

WAS IT NEGLIGENCE TO LEAVE THE KEG THERE?

From libelant's testimony, we submit, that it has not been shown that the position in which the cask, barrel, or keg was placed, was in "such close proximity to the hatchway" that "if accidentally jarred or moved it was liable to roll or fall." The law raises searching inquiries to test the question whether it was negligence on the part of the owners of the vessel to so leave it, and the answers thereto are found in the probable conduct of the person of ordinary intelligence.

Was the position of the keg one of impending danger to any one at work in the hold?

Was it placed where a person of ordinary intelligence would be likely to place it without fear of accident to any one?

Was it imprudent to place it there from any view antecedent of the event?

The position itself was not shown to be perilous. The cask or barrel or keg did not hang over the hold. It was not shown that it was nearer than four feet from the hold. It was not shown that it was on a plane inclined towards the hold. It was shown that the keg was on the further end of the covers, and that the nearer end was

not next to, but "clear from," the coamings. There was, then, some space between the ends of the covers and the coamings. It was shown that the coamings were three or four inches above the level of the covers.

If the thing that fell had been a barrel or a cask, as testified to by the principal witnesses of the libelant, the idea that its position was a menace to the persons in the hold would be so extravagant that it would never have been suggested. Libelant's witnesses testified later than those of claimants, and by the rules of law libelant would be held to their testimony, which directly contradicts the mate's, who said it was only a small pickle keg. But taking the testimony of claimants' witnesses, that it was a small pickle keg holding about 4 gallons, one-tenth as large as a barrel (pp. 114-128), and that (p. 122), it had "no cover on," and "nothing in it," and "one of its heads off," leaving it bottom-heavy, we submit that one who could foresee that it was likely from any probable cause to fall into the hold by an accident, would be one who could foresee events, fortunate and unfortunate, much beyond the ken of a person of ordinary intelligence.

If any danger lurked in the way the libelant's witnesses say the covers were laid and the keg placed thereon, it has not been testified to. It has not been testified to by any witness that the keg was in close proximity to the hatch, nor that the position in which the keg was left was one where it would not be left by any person of ordinary intelligence, or ordinary prudence. These are facts in the

case to be proven by the libelant by testimony, and not left to presumption or inference alone. That it was likely to fall down the hold from any slight force is not suggested by any testimony, by the opinion of any one, nor by the final event.

An empty keg, with no cover (p. 14) or head, stands too firmly to be upset unless considerable force is exerted. If it was of such dimensions as to be easily upset, it was the duty of the libelant to make proof thereof. No such proof was made, and it is well known that all kegs are not so. There is no presumption that a pickle keg, 16 inches high, bottom-heavy, with one head gone, is easily upset.

The libelant has not shown that it was negligence per se to place the keg on the further end of the hatch cover and away from the hatchway, on an apparently firm foundation constructed by the stevedores.

There is no testimony that the weight of the keg would make the covers tilt. The fact, if it is a fact, as testified to by Nelson, that the keg remained there unmoved for several hours, is proof that its weight alone would not cause the covers to tilt.

The libelant, we submit, has in all his testimony failed to prove any fact from which it can be concluded that there was negligence on the part of claimants in leaving the keg where it was before the accident.

"Whether a given state of facts constitutes negligence is a question of law, but whether a particular alleged negligence caused the catastrophe is a question of fact,

which it was the duty of the party asserting a claim to damages to prove."

Shearman & Redfield on Negligence, sec. 11.

Catarvissa R. Co. v. Armstrong, 52 Penn. St. 282.

V.

LIBELANT'S ACCOUNT OF THE ACCIDENT.

As the burden of proof is upon the libelant, he must likewise bear the burden which the lack of intelligence, of memory, or of veracity in his witnesses imposes upon him. We shall, at first, confine ourselves to the details of the accident as described by libelant's witnesses:

John F. Fitzgerald testified (p. 34) that he was employed along the wharf by the Pennsylvania Railroad Company, on April 11th, 1892; that he was on board the ship "Joseph B. Thomas" at the time Mr. Jens P. Jensen was injured.

"Q. What were you doing?

A. Me and another young fellow went aboard to get a piece of rope.

Q. Where were you at the time of the accident?

A. Right standing over the hatch.

Q. Which hatch?

A. The ship's hatch.

Q. Please state in your own way what you saw of this accident.

A. The mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was

helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. . . . .The hatches were taken off, and then put one on top of the other, and the keg set over, and when you tread on that corner of the hatch, that turned the keg over and it rolled right down the hatch before anybody could get hold of it.

Q. Who was the young man that trod on the hatch?

A. A young man belonging to the ship.

Q. Do you know who else was on deck at the time this barrel fell?

A. Yes, sir; I knew a young fellow by the name of William Gray.

Q. What was his business?

A. Working down at the wharf there, too."

On cross-examination (p. 37), he testified that he was employed by the railroad company as a yardman; had nothing to do with the ship "more than getting cars set for the stevedores."

"Q. Had you been on board of her before?

A. Yes, sir.

Q. Do you know her officers and crew?

A. She had no crew. When they are loading at the wharf they have no crew any more than the mate, boy, and a captain sometimes."

On pages 37 and 38 he testified:

"Q. Did you get the piece of rope?

A. No, sir; this man was hurt between the time. He wanted a piece of half-inch rope?

Q. Manilla rope? A. Yes, sir.

Q. What for? A. I couldn't say.

Q. How long a piece did he want?

A. He didn't mention the length, either, that I know of.

Q. You don't know what he was going to do with it?

A. No, sir.

Q. Did you happen to get on board there just as this accident occurred?

A. Yes, sir; it was through that that the accident occurred, I think—the mate coming up to get this piece of rope for this young man.

Q. You went right aboard, and went forward, you and Gray both?

A. We went right up forward. The ladder comes there.

Q. Did you go up on the forecastle hatch?

A. Yes, sir.

Q. When you got there, did you stand there?

A. Yes, sir."

On page 40 he testified:

"Q. Where did you find the mate? A. Down between decks.

Q. What did he say? A. He said all right, that he would come up and get us a piece.

Q. To come up, he had to come from between decks up on top of the topgallant forecastle, didn't he?

A. Yes, sir; he had to get up there.

Q. How far is that—how high is that space?

A. I don't know; about five feet, I guess. It might have been more than that.

Q. He couldn't get up without assistance, you say?

A. No, sir; Mr. O'Donnell helped him up from below on to the between decks.

Q. Then some young fellow ran around there to help him up further?

A. Yes, sir; got him by the hand.

Q. And this young fellow who ran around you say was the one that stepped on the hatch coaming; is that right?

A. Yes, sir; on the hatch coverings.

Q. I suppose he could not get around there without stepping on them, could he, from where he was?

A. I don't know; I couldn't say anything about that.

Q. Where did you first see this young fellow that ran around and stepped on them? A. I saw him when he came around.

Q. Did you ever see him before that?

A. Yes, sir; he belonged aboard the ship.

Q. Where did you ever see him before that?

A. On deck.

Q. When? A. I couldn't tell you when; several times. . . . .

Q. How old was he? A. That I couldn't say; I don't know his age.

Q. Was he forty? A. No; he couldn't be forty; he wasn't that old.

Q. Do you think he was thirty?

A. I couldn't say; I don't know his age.

Q. Was he between thirty and forty or twenty-five and forty?

A. He wasn't that. I don't know his age."

On pages 42 and 43, he testified:

"Q. Are you willing to swear that you were ever aboard of that ship before? A. Yes, sir.

Q. What did you go there for? A. We went aboard; we usually go aboard with the shipping clerk; go aboard several times.

Q. What time? A. Merely going aboard of her; that is all.

Q. You had no business aboard her at all? A. Yes, sir; no business aboard.

Q. Did you ever have any talk with the crew?

A. No, sir.

Q. Did you ever have any talk with the officers?

A. Only when we meet them at Davis', the stevedore's office.

Q. You know the stevedore, don't you? A. Yes, sir.

Q. You know all the stevedores? A. No, sir; I don't know them all.

. . . . . .

Q. How old are you? A. Thirty-eight.

Q. Do you think this young man that you saw was as old as you? A. No, sir.

Q. Did you ever have any talk with this young fellow that you speak of? A. No, sir.

Q. You don't know his name? A. No, sir; I do not know the mate's name, only he is the mate."

W. B. Gray testified (p. 98), that he was clerk of the Pennsylvania Road, remembered going aboard the ship "Thomas" on April 11th, 1892, with Mr. Fitzgerald, and was on board at the time the accident happened to Mr. Jensen.

"Q. State in your own way all you know in reference to it. In the first place, how came you to go on board?

A. I went aboard for a piece of rope. I asked Mr. O'Donnell, the boss of the stevedores, and he said he hadn't any, and called to the mate. The mate said that he would get me a piece. The mate was about climbing up the forward stanchion of the ship to the main deck. The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the coamings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and *threw the cask up in the air* and it went down in the hold. Mr. O'Donnell was helping the mate.

Q. That is all you know of the accident?

A. Yes, sir."

On cross-examination (p. 99):

"Q. Where were you standing, forward or aft of the hatch? A. Aft of the hatch.

Q. Which hatch was it?

A. The forward hatch, and the hatch covering was between decks.

Q. You were standing on the deck above? A. Yes, sir; the main deck.

Q. The mate was coming up out of the lower hold?

A. Yes, sir.

Q. On the forward stanchion? A. Yes, sir.

Q. When the mate had got about as high with his head as the top of the hatch in the between decks, O'Donnell and another man attempted to help him?

A. I saw O'Donnell attempt to help him.

Q. Some one stepped on this hatch covering?

A. Yes, sir.

Q. That produced the fall of the barrel? A. Yes, sir.

Q. Are you prepared to swear with any certainty who it was that stepped on that hatch covering? A. No, sir.

Q. Are you willing to swear that the other man who was assisting O'Donnell was a sailor connected with the ship? A. No, sir."

On redirect (pp. 100, 101), he testified:

"Q. Where was the mate coming to? Was he coming up to the deck where you were?

A. No, sir; he was coming up to the deck of between decks.

Q. So that you were on the deck above, the deck to which the mate was coming? A. Yes, sir."

On recross-examination (p. 101):

"Q. How many men were between decks?

A. That I cannot say; I know there were some boys

around the ship. I cannot say whether they were between decks or where they were.

Q. This man who tried to help the mate up—was he a man? A. Yes, sir.

Q. Was he a full-grown man?

A. Yes, sir; he was not between decks.

Q. Who was the man that was between decks?

A. The man that upset the cask.

Q. Was he a full-grown man?

A. That I could not say. From where I was standing I could not see him.

Q. You did not see him at all, then?

A. No, sir."

It is the version of these two witnesses that was relied upon by the Court below. But a minute examination of the testimony of these two witnesses will show that there is not such consistency as is requisite to form one version of their testimony but rather that there are two versions. The testimony of Fitzgerald is one narrative; that of Gray is another.

The story of Fitzgerald on the direct examination (p. 38), is this:

"Q. Did you go up on the forecastle deck?

A. Yes, sir.

Q. When you got there, did you stand there?

A. Yes, sir."

He testified (p. 40): "We found the mate down between decks and asked him for the rope. He said all right, that he would come up and get us a piece. He had to come

from between decks up on top of the topgallant forecastle. He couldn't get up without assistance. O'Donnell helped him up from below on to the between decks."

We analyze the testimony of each of these witnesses, Fitzgerald and Gray, in order to compare them.

FITZGERALD'S.

(1.) He and Gray went aboard to get a piece of rope.

(2.) That they were standing right over the hatch at the time of the accident.

(3.) That the mate was between decks. He started to come up to the main deck.

(4.) That O'Donnell was helping him to get up there.

(5.) That a young fellow started to run around to help the mate to the main deck, and trod on "the hatch, and that hatch upset the barrel and the barrel fell down the hold."

(6.) That the barrel or keg was "right on the corner of the hatch" on the main deck.

(7.) The hatches were put one on top of the other and the keg set over.

(8.) That the young man that trod on the hatch belonged to the ship.

(9.) That he saw him when he came around.

(10.) That the coverings were forward of the hatch altogether, and not more than four feet from the hatch.

He added on cross-examination:

(11.) That he and Gray went up on the forecastle hatch and stood there at the time of the accident.

(12.) That he asked the mate for the rope, and the mate said all right; that he would come up and get us a piece.

(13.) That he couldn't get up without assistance, and O'Donnell helped him up from below to the between decks.

GRAY'S.

(1.) He went aboard for a piece of rope.

(2.) Was standing (p. 99), aft of the hatch on the main deck.

(3.) The mate was coming up out of the lower hold (p. 99).

(4.) That O'Donnell gave him a lift.

(5.) That some one trod on the end of the hatch and threw the cask into the air.

(6.) That the cask was on the covering forward of the hatch between decks (p. 99).

(7.) Does not say that there was more than one covering.

(8.) That he supposed the man who trod on the hatch was a sailor.

(9.) That from where he was standing he could not see the man that upset the cask.

(10.) That the coverings were forward of the hatch.

(11.) He says nothing of being on the forecastle deck, but says he was on the main deck.

(12.) That he asked O'Donnell (not the mate) for the piece of rope. He said he hadn't any and called to the mate. The mate said he would get a piece.

(13.) That the mate came up so as to get hold of the coamings and O'Donnell helped him.

The two versions differ in these: Fitzgerald says (2) they were standing right over the hatch, and Gray (2) that he was standing aft of the hatch.

Fitzgerald says (3) that the mate was between decks, and Gray, (3) that he was coming up out of the lower hold. Both say (5) that the man ran around and trod on the hatch, but Gray confesses he did not see him (p. 102.)

Fitzgerald says (6) the barrel was "right on the corner of the hatch" on the main deck, which is clearly proven not to be true; Gray says (6) that it was "forward of the hatch, between decks," which is entirely uncorroborated. Fitzgerald says (7) the coverings were piled one on another; Gray speaks of only one covering. Fitzgerald says (8) the young man who trod on the hatch belonged to the ship; Gray, (8) that he supposed he was a sailor. Fitzgerald says (9) that he saw the man "when he came around;" Gray, after some cross-examination and after saying (p. 101) that he "cannot say whether the two boys were between decks or where they were," said by way of antithesis that the person who trod on the cover was a man, that is, not a boy, and, finally, that from where he was standing he "could not see him." If, as Fitzgerald said (p. 40), they were standing together on the topgallant forecastle, if Gray could not see the man, Fitzgerald could not have seen him. If, as Gray repeatedly swore (p. 99), he was on the main deck, because he was "aft the fore hatch," and "there was no deck above him at all" (p. 100), then he was

on the deck below that on which Fitzgerald stood, and the man who trod on the covers was on the same deck with himself, and he must have seen him if he had been there, and Fitzgerald could not have seen him, because he was looking down the fore hatch on the topgallant forecastle.

Such differences warrant a conclusion that the testimony of libelant's witnesses is irreconcilable, and that the testimony of either, uncorroborated, is too weak to sustain the libel.

In order to sustain a judgment of $6,000.00 against claimants, we submit that they have a right to demand that witnesses against them speak certainly, intelligently, and unequivocally. If the version which two of libelant's witnesses purport to give is to be trusted in preference to that which two of claimant's employes give, they claim that the story of each shall in all material points be sustained by the other. The sum of the whole is made up of testimony of small particulars, and if in those particulars these two witnesses vary, it is suggestive that the story is one not from the memory of either, but is the testimony of two persons lugged in to sustain a theory imperfectly detailed to them beforehand, and is fictitious. Both stories cannot be specifically true. If they are spetifically inconsistent, they may be so far specifically untrue; they cannot then support each other, and there is no such thing as a version by these two witnesses.

But the preference expressed by the Court below in favor of these witnesses is because, the opinion says (p. 156), "it is corroborated by the testimony of the foreman of the

stevedore's gang, and at least two of the stevedores themselves." The other two stevedores are afterwards named as Martin Ryan and Chris. Nelson.

We ask the attention of the Court to the testimony of each of those witnesses:

P. O'Donnell's testimony is set forth in general terms in the opinion of the Court (p. 156), thus: "After I got the stage up, I used short wood to chock it, and the second mate of the ship jumped down to see how much short wood I was using. He came down to see whether I was using too much. He stood a minute and said it was all right. He started to climb up the forward stanchion of the forward hatch. He got up as far as the combings, when he put his hand over and sung out to a boy, to the best of my knowledge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand, put it under his foot to help him over, and I heard somebody halloo 'under,' and when I looked down the hatch I saw this man laying on the floor of the ship—that is, Jensen." On cross-examination, he reaffirmed the statement that the mate (meaning the second mate) was in the between-decks. He was unable, however, to say who it was that went forward to help the mate up, as he was in the between decks.

This account gives no substantial verification to the story of either Fitzgerald or Gray, except that he says that "the second mate started to climb up the forward stanchion of the forward hatch. He got up as far as the coamings and sung out to a boy, to the best of my knowl-

edge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand—put it under his foot to help him over, etc." But there is other testimony of O'Donnell from which this Court may judge of his intelligence, the value of his testimony, and to what extent he corroborates the stories of Fitzgerald and Gray.

Fitzgerald testified (p. 40), as quoted above, that he asked the mate for a piece of rope; found him between decks; that the mate said, "all right, that he would come up and get us a piece." O'Donnell testified (p. 47), as quoted in the opinion, that "the second mate of the ship jumped down to see how much short wood I was using. He came down to see if I was using too much. He *stood there a minute*, and said it was all right. He started to climb up, etc."

If Fitzgerald asked the mate for a piece of rope, he must have called out from the topgallant forecastle to where he said the mate was; that is, between decks. If he did so, as O'Donnell said the mate came down there and "stood there a minute," O'Donnell would have heard Fitzgerald ask, and if the mate replied, O'Donnell would have heard the reply. But of this fact—which Fitzgerald must have deemed as of exceedingly great importance, as he testified (p. 38), that "it was through that [his coming on board for a piece of rope] that the accident happened, I think—the mate coming up to get this piece of rope for this young man [Gray]," O'Donnell gives no evidence of consciousness. The mate's presence was for only "a minute," and as soon as he had satisfied himself that O'Don-

nell was not using too much wood for dunnage, he began climbing up. If it had happened, if Fitzgerald had called out to the mate down between decks, and the mate had replied, as Fitzgerald said he did, O'Donnell would have heard it. If it had been true, O'Donnell would have been asked concerning it and would have verified it. O'Donnell did not speak of ever having seen or heard of Fitzgerald. He would have done so had it been a fact.

Fitzgerald said (p. 40) that O'Donnell had "helped the mate up *from below* on to the between decks, and that "then some young fellow ran around there to help him up further."

O'Donnell testified (p. 50), on cross-examination:

"Q. Was that the ladder that the mate was coming up?

A. No, sir; the mate wasn't down in the lower hold."

Here the testimony of Gray may be pertinent. He testified that the mate was in the lower hold. Thus (pp. 100, 101):

"Q. Where was the mate coming to? Was he coming up to the deck where you were?

A. No, sir; he was coming up to the deck between decks." The only place *below* the between decks, was, according to O'Donnell's cross-examination (pp. 50, 51), the lower hold.

Here, then, is a direct contradiction between Fitzgerald and Gray on one hand, and O'Donnell and Gray on the other. This certainly is not corroboration.

Moreover, Fitzgerald has testified with particularity that the man who came up from below was the mate, for

he called to him and asked him for a piece of rope. Yet when called upon, on cross-examination to identify the young man that he said (p. 43) trod on the coverings, he testified (p. 44):

"Q. Did you ever have any talk with this young fellow that you speak of? A. No, sir.

Q. You don't know his name?

A. No, sir; I do not know the mate's name, only he is the mate.

Q. The young fellow wasn't the mate, was he?

A. No, sir; not that I know of.

Q. Nor the second mate?

A. I couldn't say whether he was the second mate or not.

Q. The young fellow was neither one of the mates?

A. I don't know whether he was the mate or not.

Q. If he ran around to help the mate, of course he wasn't the mate.

A. No, sir; the one in the hold I call the mate; the one that was down between decks that I always called the mate."

Scarcely any testimony could be more direct proof that he did not know the mate or the second mate from anyone else. His testimony then that he asked the mate for a piece of rope, or saw the mate coming up from below, is absolutely worthless.

O'Donnell corroborated Fitzgerald only in his ignorance of the fact whether the mate came up from between decks or not. He testified, on cross-examination (p. 54):

"2. Was it the first or the second mate that was coming up the hatchway that you are speaking of?

A. It was the second mate, *as far as we understand it.*"

The claimants believe that they have a right to protest against the interpretation of such testimony, as a basis for finding that an officer in their employ had any part in an accident for which they are by the judgment herein held responsible in large damages.

Gray testified (p. 98):

"I asked Mr. O'Donnell, the boss of the stevedores [for the piece of rope], and he said he hadn't any and called to the mate."

This witness was not content with leaving the testimony of the alleged transaction as Fizgerald had told it. Fitzgerald had said that he found the mate between decks, and that it was he who asked the mate for it. Now, Gray averred that it was he who asked for it, and he asked O'Donnell first, and O'Donnell said he hadn't any, and called to the mate. (p. 98.)

Gray does not corroborate Fitzgerald in his story, but tells a different one. Fitzgerald does not corroborate Gray in his story, but tells a different one. O'Donnell does not corroborate either Fitzgerald or Gray in their stories about the piece of rope, does not allude to Fitzgerald, does not allude to Gray, does not allude to the piece of rope. O'Donnell's consciousness was not awakened by any interrogatories concerning either of these applications, and he volunteered nothing. If the testimony of either Fitzgerald or Gray had been true on this point, it is

most probable that O'Donnell would have corroborated both, or one at least. He corroborated neither.

Fitzgerald said that the mate had got up on to the between decks by the help of O'Donnell, but O'Donnell denied it, and said he helped him only high enough to catch hold of the coamings, when he left him dangling there, and gave no heed to the further progress or ultimate arrival of the so-called mate. But we call attention to further testimony of Patrick O'Donnell in proof of the weakness of his testimony, and to sustain our claim that testimony so fragile should be estimated only at its proper value. The witness was evidently brought in without any previous knowledge that he was to be examined or cross-examined, for he said, in excuse for his inability to testify to facts which, plainly, should have been within his knowledge (p. 48): "Of course I never thought I was going to be cross-questioned on it, or I might have remembered more." But he was not being cross-examined, for the answer was on the direct examination. His testimony showed him to be either exceedingly ignorant, or exceedingly careless of his duties. Whichever was the case, his testimony bears the impress of a story the details of which he had forgotton, and now imagined and told to help out an unfortunate fellow-stevedore.

On page 46 he said he had no record anywhere of the name of the men under his employ; and on another day (p. 84) produced a list from a book kept by some one else, one Charles Hanson; the time-keeper who did not

testify; he said (p. 47) that the keg was as big as a "vinegar barrel or a cider barrel"; (p. 48) he didn't know whether or not all of his gang were down in the hold; he said (pp. 48, 52) that he had only one man between decks with him, yet Chris. Nelson, another witness, especially relied on in the court below as a corroborating witness, said (p. 102) that he was in the between decks; and Charles King testified (p. 105):

"Q. How many men were at work there with you?

A. On my side there were *three men and* the foreman."

That was two more than O'Donnell testified to. If this was true, O'Donnell did not testify truly.

O'Donnell testified (p. 46) on direct-examination: "Q. Do you know how many you had [in the gang]?

A. . . . . I had fourteen men, I should judge."

On page 49 he said: "To the best of my knowledge I suppose there was about twelve men" in the lower hold, one on the forecastle hatch, and "one in between decks with me." That would be 12 plus 3 equal 15. If King was right, there were 12 plus 4 equal 16. Besides these, there was Gabel (p. 74), who testified that he was "out by the engine on the wharf." That would make 17. The point we make here is simply that according to libelant the number of men in the gang and the location of each would seem to be of great importance in determining the fact as to who trod on the covers. But by his own witnesses he has mistaken the number, and he (O'Donnell), so strongly relied upon, plainly testified without knowledge

or forethought or intelligence, and as he put little value upon his own knowledge, we claim that this Court should put as little value upon his testimony. One of his duties was to see that the work done by his gang was properly done. If it was of importance to see that the hatch covers were properly piled, it was his duty to see that it was so done. He had been cautioned by the second mate to lay them properly or some one would get hurt, and this fact had been testified to by the second mate, several months before (p. 119), and also that the stevedores "put them down anyway at all, as they were always in a hurry"; yet, when called to testify he not only did not in any way deny the truth of the story of the second mate, but when his attention is courageously called by counsel for claimants to this testimony of the second mate, and asked what he knew about the piling the covers, he said (p. 55): "I can't tell any more than one was laid down on deck and the other on top of it"; and being asked to tell what was the proper way of piling them he answered: "I suppose one on top of the other." He did not know how they were piled that day; did not deny they were improperly piled, nor did any one else; he did not know how they should be piled, nor if there was any way of piling them which would have rendered them safer (p. 56).

We submit that the testimony of O'Donnell corroborates no version of the accident adverse to the claimant, but arrests the attention of all who read it by its proof of his ignorance, indifference, and evident willingness to help his coservant to the prejudice of claimants.

In order to see to what extent the testimony of Fitzgerald and Gray and O'Donnell is supported by the other two stevedores, Martin Ryan and Chris. Nelson, we will quote from their testimony.

Martin Ryan was a witness who was thought by the Court below to corroborate the testimony of the previous witnesses, Fitzgerald and Gray. An examination of the language of the opinion and the complete testimony of Ryan leads us to the conclusion, that his testimony appeared to corroborate on a single point, to-wit, that it was the second mate who climbed up from between decks. But its weakness will more clearly appear from quotations.

He testified, on page 57, that he was in the lower hold "working, tearing up an oil stage; that he did not see Jensen struck by the barrel." He was then interrogated, as follows:

"Q. How did you learn of the accident?

A. All I saw, I saw the second mate climbing up from between decks on the upper deck, under the gallant forecastle. The next I heard was, 'Look out below.' I jumped into the wing of the vessel to get out of the way, and I looked around and I saw the keg laying there and Jensen laying down."

The distance from the bottom of the lower hold to the main deck was eighteen feet, according to O'Donnell (pp. 50-51). From the lower deck to the main deck was about seven feet. (O'Donnell, p. 50.) It was then twenty-five feet from the bottom of the lower hold to the main deck, and the only way to see from the former to the latter

would be by standing directly under the hatchway, and, as the hatchway was only about 6 feet square, by throwing back the head, with an exertion so as to look nearly perpendicularly upward. It must be the exertion of a leisure moment, and not when one is "working, tearing up an oil stage." But when one is anxious to testify, he may narrate things improbable. His anxiety may also allay his solicitude lest he speak anything but the truth. In that attitude Ryan said he "saw the second mate climbing up from between decks." He saw only the second mate. He did not see the barrel or keg coming down, but after the keg had begun to fall down the hold, and had only twenty-five feet to fall, the next he heard was, "Look out below," After the keg had started, and he had heard the warning voice, and not before, he "jumped into the wing of the vessel to get out of the way." The story is not probable. But he was cross-examined, and then testified (p. 58):

"Q. You saw the mate coming up the *ladder* from between decks. A. Yes, sir; climbing up.

Q. Just about that time you heard somebody halloo out, 'Look out from under'?

A. 'Look out below.'"

He was asked directly if he saw the mate coming up the *ladder*. He answered, "*Yes*, sir; climbing up."

He was asked if somebody hallooed, "Look from *under*," but he remembered differently. Some one did not say that, but said, "Look out *below*." The witness was over-nice, and thereby excites distrust. In *this* particu-

lar, he swore contrary to O'Donnell, who testified (on p. 53):

"Q. You heard somebody halloo, or was it you that hallooed, 'Get from under'?

A. No, sir; somebody on the forecastle deck hallooed, 'Under.'"

And the second mate testified (p. 114) that he sang out, "Stand from under."

Inasmuch as the witness was particular to show the counsel that he was wrong in the assumption in his question, we must be equally particular in showing that the witness differed from the one he is thought to corroborate.

On the same page (58) Ryan was asked:

"Q. Was it the second mate or the mate that you saw going up the ladder?

A. The second mate."

This testimony does not corroborate, but contradicts, that of O'Donnell, who said (p. 47), that the second mate "started to climb up the stanchion," not up the ladder. He also said (p. 50) that you get from the lower hold to the between decks "by a ladder"; and also:

"Q. Was that the ladder that the mate was coming up?

A. No, sir; the mate wasn't down in the lower hold."

We claim that the testimony is neither corroborative of the testimony of any other witnesses, nor probable, nor true. It does not corroborate any witness as to whether it was the second mate who climbed the stanchion, for (1) there can be no corroboration of testimony in itself value-

less—that of Fitzgerald and O'Donnell, who did not, either of them, know who was the second mate, and therefore could not be heard to testify that he was the second mate who they said climbed the stanchion; and (2) the story that he, who did not appear to have knowledge greater than Fitzgerald or O'Donnell, saw the second mate climbing up twenty-five feet directly above him, is plainly only an endeavor to testify something of importance; and (3) he saw the second mate on a ladder which was not there, and thereby directly contradicted the witnesses he was said to corroborate.

We next examine the particulars in which Cris. Nelson is said to corroborate Fitzgerald and Gray. In the very beginning of his testimony, as quoted in the opinion (p. 157), Nelson said: "There was no ladder in the hatch. The second mate came down the stanchion, sliding down the stanchion, and he went up the same way"; thus in his first breath contradicting Ryan, his fellow, corroborating witness. Nelson further said (p. 60): "And as he went up this keg came down. He [the mate] hallooed to one of the boys or young men belonging to the ship to help him out of the hatch, and Mr. O'Donnell, the foreman, helped him up, and the keg came down, and that's all I know." This looks as though he had heard the story of the other witnesses, and intended to corroborate their testimony.

He further testified that he did not help take the hatch covers off, and added: "I know where the hatch covers were laying at." But he did not volunteer any information as to how they were laid, nor was he asked it by libel-

ant's counsel. If they had not been laid as the second mate had specifically testified several months before, Nelson, who knew where "they were laying at," could have disputed the fact, and have put our witnesses to shame. He knew. He was not asked. He did not tell. He, therefore, by his opportunity, and, by his silence, corroborated the testimony of Peterson in that regard.

On cross-examination, Nelson testified (p. 61):

"Q. While he was going up this stanchion this keg came down?

A. Yes, sir; after he got on deck, as he got over the coamings on deck.

Q. That is to say, you say he was all the way over the coaming?

A. He got on top of the coamings, and I saw the keg coming down. That's all."

Then, according to Nelson, it was not as the mate went up that the keg came down, as he had just testified ,but after he had got there. He testified further (p. 62):

"Q. You don't know whether he stepped on the coverings or not?

A. I know that he had to get on them to get on deck.

Q. Do you know that his feet were over the coamings?

A. Yes, sir; as he got on top of the coamings the keg came down; that's all I know.

Q. Then your impression is that the second mate must have stepped on that hatch coaming? A. Yes, sir.

Q. As soon as he stepped on the hatch coaming, that upset the keg; that's your idea, is it? A. Yes, sir.

Q. Did you see that keg before?

A. Yes, sir; I saw it that forenoon. A young man was sitting painting it, and set it there to dry on the hatches."

This witness, instead of corroborating the version of Fitzgerald and Gray, has thus uttered a new theory of his own. They testified that the keg—cask—was thrown down by some one running around to help the mate. Nelson now says that his idea is that the mate himself "upset the keg." He certainly does not corroborate the testimony he was cited to corroborate, save in saying that it was the second mate who was between decks. The other witnesses, Fitzgerald and O'Donnell, admitted that they could not identify the second mate. It does not appear that Nelson was doing other than repeating what he had heard, or that he knew the second mate from any one else. He directly contradicted O'Donnell in his story of the position of the second mate. He said (p. 61) that the mate "got over the coamings on deck"—"all the way over the coamings."

O'Donnell said as distinctly (p. 54), on cross-examination:

"Q. And he had not got up all the way, as I understand, at the time this keg upset or fell down?

A. He got up far enough to put his hand over the coamings and sing out for help.

Q. I mean that he was not up on the deck?

A. No, sir; his body was about from the deck to the top of the hatch coamings, and his leg was below."

Of course, Nelson could not corroborate O'Donnell and maintain a separate theory of his own, and one so directly opposed to that of Fitzgerald and Gray. He showed himself to be a very willing and zealous witness, as he attempted to corroborate Fitzgerald in what he said of the person who was said to have helped the second mate up, and at the same time, unasked, volunteered further testimony about the boy and the keg, as follows (p. 63):

"Q. What was this young man doing that helped the mate up? A. He belonged to the ship.

Q. What was he doing?

A. Working around the deck, mostly at anything.

Q. What was he doing at the time?

A. I don't know exactly what he was doing at the time, but I know one of the two young men had been painting that keg and set it on top of the hatches to dry.

Q. You don't know that it was this young man?

A. No, sir; because the second mate hallooed for help to get him out of the hatch.

Q. You didn't see the young man? A. No, sir."

His testimony then that the person, not who threw the keg down, but, who helped the second mate up, belonged to the ship, was thus rendered valueless by his own admission that he did not see him. It is as clear, too, that he did not see the second mate step on the coverings, for that was impossible.

This particular examination of the testimony of the witnesses on whom the Court below relied demonstrates very clearly that there was no single important fact—

save such as is admitted by claimants, to-wit, that the libelant was injured by the falling of a small keg—proven by the concurring testimony of any two of the libelant's witnesses. We cannot tell, from the testimony of any two of them, by whom the keg was thrown down the hold. Fitzgerald alone professes to have seen the man "as he came around." Gray could not see him. Nelson said his impression was that the second mate did it, but he could not see. If his theory were true, then all that Fitzgerald said about the man that "belonged to the ship" running around is a mere fabrication. No other of the libelant's witnesses gives any clue to the way out of the darkness.

Upon one part of the evidence of Fitzgerald we have not, perhaps, sufficiently dwelt, and that is that wherein he testifies that the person who ran around and trod on the covers belonged to the ship. We have,as we believe, clearly shown that in other details the testimony of Fitzgerald thus far noticed is uncorroborated and untrustworthy. His testimony on this point is equally so. His whole testimony, as it has been examined and criticised, suggests that neither he nor Gray were on board the vessel at the time of the accident; that they were an afterthought subsequent to the taking of the deposition of the second and third mates, when it was clear that there was no one on board the vessel at the time of the accident who could testify that any one belonging to the vessel had anything to do with throwing the keg down the hold.

Note the particulars which cast suspicion upon their testimony. They were not employed on the ship (p. 34),

but were employed along the wharf by the Pennsylvania Railroad Company. Their business, then, was on the wharf. They said they had no business at all on the ship (p. 42).

Fitzgerald said (p. 34.): "Me and another young fellow went aboard to get a piece of rope."

On cross-examination (p. 37) he testified:

"Q. You went aboard of her with somebody else to get a rope. A. Yes, sir.

Q. Where did you expect to get a piece of rope there?

A. From the mate.

Q. Did you see him and ask him for it? A. Yes, sir.

Q. What were you going to do with it?

A. It was for this other young fellow, Gray.

Q. What did he want it for?

A. I couldn't tell you."

This has the aspect of a mere excuse. He threw on Gray the duty of telling what the rope was wanted for, but Gray did not tell. Then, like a witness who goes into useless detail for the sake of appearing to be a true witness, he added, without being asked (p. 38): "He wanted a piece of half-inch rope.

Q. Manilla rope? A. Yes, sir."

He knew the exact size wanted, but not its use. This adds to the improbability of the story. Then he began to shield himself from self-betrayal by denying knowledge of further details.

"Q. What for? A. I couldn't say.

Q. How long a piece did he want?

A. He didn't mention the length, either, that I know of.

. . . . . .

Q. Did you happen to get aboard there just as this accident occurred?

A. Yes, sir; it was through that that the accident occurred, I think; the mate coming up to get this piece of rope for this young man."

They went right aboard, he said, and he and Gray went up forward on the forecastle hatch and stood there. Then the accident happened. They did not get the rope, he said (pp. 37, 38). Then he said, the young man who trod on the cover "belonged aboard the ship" (p. 41). He had seen him before on deck—"couldn't tell you when, several times."

"Q. What was he doing when you saw him?

A. He was coming around to help the mate: knocking around the deck and one thing and another—I couldn't say what he was doing."

Interrogated as to his age, he could not say; "He could n't be forty."

"Q. Do you think he was thirty?

A. I couldn't say; I don't know his age."

He could not tell whether he was twenty-five.

"Q. Was he a man?

A. He was a young man; yes, sir.

. . . . . .

Q. Do you know his age, whether he was sixteen or forty? A. I know he was n't forty.

Q. Are you sure he wasn't sixteen?

A. No, I couldn't say that."

He was sure of one thing only—that the man was n't forty. From this it is quite evident that he did not intend to swear that the young man was one of "the boys" belonging to the ship. The witness himself was thirty-eight (p. 43), and he did not think the young man as old as himself. He further testified (p. 42) that he never had any talk with the crew; that he did not know all the stevedores (p. 43); that he never had any talk with the young man; did not know his name. He testified (p. 44):

"Q. The young fellow wasn't the mate, was he?

A. No, sir; not that I know of.

Q. Nor the second mate.

A. I couldn't say whether he was the second mate or not.

Q. The young fellow was neither one of the mates?

A. I don't know whether he was the mate or not?

Q. If he ran around to help the mate, of course he wasn't the mate.

A. No, sir; the one in the hold I call the mate—the one that was down between decks that I always called the mate.

Q. You didn't know in what capacity this young man was at all? A. No, sir.

Q. You don't know where he belonged to?

A. He belonged aboard the ship.

Q. Where did he live? A. Aboard the ship.

Q. Are you sure of that? A. That is what they say.

Q. Who said so?

A. That is what I say myself. I don't know whether he lived there or not. Sometimes they live ashore. Sometimes they sleep aboard and eat ashore.

Q. Where did you get this information from that he belonged to the ship?

A. Nothing, only seeing him knocking around there, that's all.

Q. You didn't know every man in the stevedore's gang, did you?

A. No, sir; only by sight.

Q. Did you know them all?

A. Those that knocked around the wharf I know—the stevedore's men—by eyesight.

Q. Did you know every man in the stevedore's gang working there that day?

A. No, sir; I couldn't swear to that."

Thus driven to the wall, he confessed that he did not know whether the young man was one who belonged to the ship or a stevedore.

The only one, then, who testified directly that the man who trod on the covers "belonged to the ship" was Fitzgerald, and his testimony on that point we believe utterly worthless. We submit that, in this account of the accident by witnesses for libelant, there is no trustworthy, consistent, corroborated, or probable version, beyond that of the fact that a keg, or cask, belonging to the vessel, that had been standing most of the day on one of the hatch covers, not nearer than the length of the covers

from the hatch, had been upset and thrown down the hold by some one who trod on the covers. That person is not identified, nor in any way indicated. But in this account of the accident by libelant's witnesses, it is to be noted what occurred, according to Fitzgerald (p. 35), when some one who "ran around," and, according to Gray (p. 98), "trod on the end of the hatch and threw the cask up in the air, and it went down in the hold."

If this person ran, and, in running, trod upon the hatch cover, the act must necessarily have been like that of jumping, with one foot, for the action of running and landing on one foot is simply the same as jumping. The act was not then simply that of treading upon the hatch cover with a light, or with a usual pressure, but must have been a throwing of the whole weight on the end of the cover with an increased pressure, and one much augmented beyond that of simply treading upon it. It was only by this extraordinary, unusual, improbable, and therefore unforeseen pressure, that, according to their testimony, the covers were disturbed or anything placed upon them thrown down. It did not, according to any one's testimony, occur readily, nor soon after the keg was placed there. It did not occur, save by the pressure of unusual and extraordinary force. As we have seen above, the covers did not come within three or four inches of the top of the hatch coaming, and were laid entirely clear of the coamings. The keg could not rise above the level of the covers and over the coamings without being subject to

some extraordinary force. If force enough "to throw it up into the air" was requisite in order to bring about the accident, then no place on the ship could have been chosen without the charge of negligence.

If, contrary to this evidence, defining the position of the hatch covers, it could be argued that they were placed athwart ship, and not fore and aft, and as possibly the distance of the "port forward end away from the hatch" was less than six feet ,still the incontrovertible fact remains that the force necessary to bring about the two results of "tossing the keg into the air" and causing it to fall into the hold, must have been extraordinary, and such as could not have been foreseen, or anticipated, or counted among the natural results, against which it was the duty of claimants to provide, and failure to provide against which can be declared to show culpable negligence.

There is no testimony that the weight of a man would move them, if properly laid. There is none that anything less than the weight of a man thrown upon them with the force of a man running could have moved them.

If the weight of the keg, or of a man, did not cause the cover to tilt so that the negligence of the stevedores was betrayed, then the insecurity of the covers as a place on which to lay the keg was not apparent to the employee of the ship, and the placing the keg there in a position which, in an unusual and improbable event, was proven to be not wholly secure, but the insecurity of which was the work of the stevedores, would not make the ship responsible for the result.

It is no way probable that the covers could not be laid so as not to tilt, for that would be a perpetual menace to any one who approached them, and the fact, if a fact, could and would have been, clearly proved.

If the covers did not tilt when lightly touched (and the libelant has offered no proof of such fact), then the covers were laid firmly enough. If so, then if libelant would have the court to believe that it was negligence to place an empty keg on the further end, it is not a conclusion that can be reached from presumption, but should have been proved clearly.

Whether there was any tilting of the covers as laid, is a material fact. If there was any visible, or probable it might have been negligence to leave the keg there. If none appeared, then there was no negligence. The libelant has failed to prove such a fact, necessary which is in order to hold respondents liable for an injury caused by one of the stevedores.

From this testimony for the libelant it is clear, that it could not have been negligence per se to place the keg in that position. If such was the fact, it was the duty of the libelant to introduce further testimony to make it clear to the Court.

If properly laid, the covers would not, without extraordinary force, tilt so as to upset the keg, or set it rolling; and there is no basis in the testimony for the contention that the keg was placed by a ship employee in a place where, if any one trod on, or jarred the hatch covers, it

would probably roll or fall to the danger of any one in the hold.

VI.

CLAIMANT'S ACCOUNT OF THE ACCIDENT.

Before proceeding further on the lines of the opinion, we deem it proper to quote the testimony offered in behalf of claimants. Only three of the crew were available to testify. One was the carpenter, Ole Larsen, who said (p. 147) that he did not see the accident; Peterson, the second mate, and Hannum, the third mate, testified fully concerning it. Their testimony was distrusted in the court below, yet we now call the attention of this Court to it, because it was the first testimony taken in the case; because it was given by persons who were present; because it is reasonable and truthful upon its face; because an opportunity to impeach it and specifically deny every assertion made in it was given, and the opportunity entirely neglected. As it is the testimony of two who corroborate each other definitely and specifically, it is entitled to be accepted as the only correct narrative of the event. Pe-

Peterson, the second mate, stated (p. 111) that the accident happened in the afternoone, and then admitted the allegation of the libel that particularized it (p. 6), as having occurred between three and four o'clock. He further testified (p. 111):

"Q. At the time he was injured was the ship taking in or discharging cargo? A. Taking in cargo.

Q. State if you know whether a stevedore was employed to store the cargo.

A. Yes, sir; a stevedore was employed.

Q. Where was the man when he was injured?

A. He was down in the lower hold forward under the fore hatch.

Q. At the time he was injured where were you?

A. I was up alongside the hatch coaming on the main deck.

Q. The forward hatch coaming?

A. Yes, sir; on the port side.

Q. On the main deck? A. Yes, sir.

Q. Where is that hatch situated, that is, the part of it that goes through the main deck?

A. In forward of the foremast.

Q. State whether it was or was not under the topgallant forecastle.

A. Underneath the topgallant forecastle.

Q. Then there was a hatchway through the topgallant forecastle directly above it? A. Yes, sir.

Q. Who was standing there with you, if any one, alongside the hatch?

A. There was no one just alongside of me, but there was one of the stevedore's men came along.

Q. Never mind the stevedore's men. I mean of the ship's company.

A. The third mate was a little way from me. He was not alongside of me. He was a little ways of me.

Q. Outside of or underneath the topgallant forecastle?

A. Underneath the topgallant forecastle.

Q. Did you see the way in which the accident happened? A. Yes, sir.

Q. Go on; state how it happened.

A. There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man.

Q. Who was the man that trod on this hatch cover?

A. One of the stevedore's men. Which one it was I cannot say.

Q. It was one of the stevedore's men, but you do not know his name?

A. No, sir. I did not take particular notice which one it was.

Q. Were any others of the stevedore's men underneath the topgallant forecastle except this one that trod on the hatch? A. I don't think there was.

Q. What was this stevedore's man doing when he trod upon the hatch cover?

A. I don't know exactly what he was doing. He just happened to come along and touch the hatch cover. Either he was going down in the hatch, or what he was going to do I don't know. I know he just happened to touch the hatch cover the least mite.

Q. Had this forward hatch cover been taken off that morning? A. Yes, sir.

Q. Who took it off? A. The stevedore's men.

Q. State who took the hatch covers off in the morning when they went to work. A. The stevedore's men."

He described the keg as hereinbefore quoted, and testified further (pp. 114, 115):

"Q. Then when the keg tipped over the hatchway, you were standing right alongside the hatch coaming?

A. Yes, sir.

Q. On which side of the hatch, port or starboard?

A. On the port side of the hatch coaming.

Q. What was the reason that this hatch cover tipped when the stevedore's man touched it, or stepped upon it?

A. It was not laid down as it ought to be. It was not laid down solid. If the hatch coverings were put down as they ought to be, one on top of the other, there would not be any trouble attached to it, but they just put them down any way at all as they were always in a hurry.

Q. That is, the hatch covers tipped on account of it being piled up; from the way in which they were piled up by the stevedore's men? A. Yes, sir.

Q. How many hatch covers were there? A. Three.

Q. Were they crowning at all?

A. Yes, sir; a little crown to the hatch."

On cross-examination, Peterson repeated and emphasized what he had before testified. He said (p. 117):

"Q. And you mean to tell us then that just as this keg tipped over and fell down you happened to be looking down? A. Yes, sir.

Q. Just at that moment?

A. Just at that moment, yes, sir.

Q. What were you doing under the forecastle head?

A. I don't exactly recollect what I was doing. I had underneath there two boys, and the third mate, finishing something I was doing. I cannot recollect now what I was doing. There is always something.

Q. How far was this work from the forward hatch?

A. I should judge about ten or twelve feet from the hatch.

Mr. Andros.—Q. That is where you had been at work?

A. Yes, sir."

The witness gave his deposition on the 17th day of October, 1892, and it is not strange that he could not remember and describe in detail, the probably not very important work that he had been engaged in immediately before an accident that had happened six months previous. Certainty of memory and narration would have tended to discredit him, for it would have been unnatural, and have aroused suspicion that the story had been in part invented, with particulars to fit. It was such particularity that we claim has brought discredit upon the testimony of libelant's witnesses.

As to the solidity with which the coverings lie, when properly laid, he testified, (p. 118):

"Mr. Holmes.—Q. How much of a crown is there to them? A. Not much, just a little.

Q. Hardly perceptible to the eye?

A. Yes, sir; you can see it.

Q. Is it not a fact that when these three hatch covers of the forward hatch are piled one on the other, the lower one being flat on the deck, that they stand solid?

A. They stand pretty solid, yes, sir. One of them is laid on the other.

Q. Don't they stand absolutely solid?

A. They stand solid enough, so that they would not do any damage.

Mr. Andros.—Q. That is when they are piled down as they ought to be?

A. Yes, sir; when they are piled down as they ought to be. There is a ring bolt in each corner of the hatch to lift them with, and when those hatches are not laid down properly they will wobble."

This witness thus invited the libelant to show that the covers had a high crown, were unevenly made, could not be made to fit, never did fit, always wobbled and would upset anything that was laid on them, and were generally defective in this particular; yet the libelant offered no testimony that casts the slightest suspicion upon the truth of all that he had said of the solid condition in

which the covers usually were when properly laid. The witness, even unasked, unnecessarily but voluntarily, as if in response to a natural and truthful impulse, disclosed the fact that there was "a ring bolt in each corner of the hatch to lift them with," and again invited testimony to prove that the covers never were, and never could be, piled solid. The invitation to discredit what he said was not accepted. He had testified with perfect confidence in the truth of his testimony, and all that he said stands uncontradicted.

Peterson testified further (p. 119), as before quoted, that he had cautioned the foreman of the stevedores to lay them down as they ought to be, and Mr. O'Donnell, the foreman, accepted his testimony in silence. He testified further (p. 120):

"Q. Who do you say was with you there at the forward hatch?

A. The third mate was underneath the forecastle too —the third officer, and there was a couple of the boys underneath the forecastle too, but they were in the forward part—away forward."

Knowing that these two boys had left the vessel several days before, and were utterly lost to aid his testimony, if he had had any idea of concealing any fact or any evidence of a fact, he would not have spoken of the two boys. The fact of their existence came from him, and the fact of their absence and his honesty has apparently been made the basis of distrust in him.

The testimony of Henry Hannum, the third mate, who, as the second mate has just testified, was underneath the forecastle at the time, corroborated in every important particular that of the second mate. He testified, on direct examination (pp. 127 et seq.):

"Q. While the ship was in Philadelphia do you know of one of the stevedore's men being injured in the lower hold of the vessel? A. Yes, sir.

Q. At the time he was injured where were you—what part of the ship?

A. Standing under the topgallant forecastle.

Q. How near to the forward hatch?

A. I was about three feet away. When he was hit I was looking right over the hatch.

Q. Where was the second mate at that time?

A. Under the topgallant forecastle, near the forehatch.

Q. How near to the hatch? Close by or away from it?

A. Pretty close.

Q. Where was this man that was hurt at work?

A. He was about even with the beams in the lower between deck.

Q. Working in the lower hold? A. Yes, sir.

Q. How high in the lower between deck had the cargo been stowed? Under the square of the fore hatch?

A. I think about five feet under the lower between deck; five or six feet.

Q. What hit him, if you know?

A. It was a keg.

Q. What sort of a keg was it?

A. It was a pickle keg. I think it was one of these small pickle kegs.

Q. State whether that keg fell down through the hatch into the lower hold. A. Yes, sir.

Q. Where was the keg before it fell?

A. It was setting on the fore hatch under the forecastle head.

Q. How happened it to fall down in the lower hold, if you know?

A. One of the men trod on the hatch, and the hatch tilted and the keg rolled off, and fell down.

Q. What man was it—one of the crew of the ship or one of the stevedore's men?

A. One of the stevedore's men.

Q. Do you know who took off the fore hatch covering on that morning under the topgallant forecastle?

A. The stevedores.

Q. Where were these hatch covers piled?

A. Piled in the forepart of the hatch.

Q. Forward of the coamings? A. Yes, sir.

Q. Forward of the forward coamings?

A. Yes, sir.

Q. When the keg tilted and fell over the coamings of the hatch did the second mate say anything?

A. Yes, sir.

Q. What did he say?

A. He sang out, 'stand from under.'

Q. Did you see the keg when it started?

A. Yes, sir, I see it, but I was too far away to get to it before it fell over the hatch.

Q. Had it hit the man before you looked down the hatch?

A. Yes, sir; just as I got there to the hatch I saw the keg fall.

Q. Who was under the topgallant forecastle besides you and the second mate and this man who trod on the hatch? Any of the boys or the ship's company?

A. Yes, sir; I think one of the boys was under there.

Q. How many belonging to the ship were on board of her at this time? Yourself, and second mate, and who else? A. Two boys.

Q. Was her crew then shipped at this time?

A. No, sir. They had all left.

Q. The only person that belonged to the ship was yourself, the second mate, and these two boys at that time?

A. There was a steward and carpenter, and the port captain.

Q. Where was the master of her at that time?

A. He was at home.

Q. Do you mean in Philadelphia?

Q. No, sir, at Thomaston, Maine.

Q. Where was the first officer?

A. He was home down at Thomaston.

Q. Do you know what this stevedore's man that trod on the hatch was doing, where he came from, or where he was going?

A. I think he came out of the watercloset.

Q. He was crossing over the deck from one side to the other. Do you know which side he came from and which way he was going?

A. He came from the starboard side.

Q. Which side of the ship lay to the dock?

A. The port side."

This testimony of the third mate, in corroboration of that of the second mate, proves that the man who trod on the hatch covering was a stevedore. These two, and Fitzgerald, are the only witnesses who claim to have seen the person who trod on the cover. It is claimed on behalf of libelant that it was one of the crew, because, as the Court below states in its opinion (p. 161), (1) "everyone connected with the stevedore's gang on that day was called by the libelant, and not one of them stated that he was the person who trod on the hatch cover." To this argument it may be replied, (1) that only one of them was asked if he was the person, and he was the only person who denied that he threw the barrel down or trod on the coverings (p. 103); that was King, who testified on page 102, as follows:

"Q. State where you were on the ship at the time.

A. I was in the between decks. I was carrying wood forward. That was dunnage. As I came back for another armload, I happened to see a cask come down the hold and I hallooed. It hit Jensen on the head and threw him to the floor.

Q. Were you on the same deck that Mr. O'Donnell the foreman, was on? A. Yes, sir."

And on cross-examination he testified (p. 104) thus:

"Q. You were on the between decks?

A. Yes, sir. I was rolling a barrel of oil out of the way to make a gangway for me to walk in and get the dunnage away.

Q. This barrel came from above? A. Yes, sir.

Q. Therefore it must have come from the main deck?

A. It came from the main deck and struck this gentleman on the head."

This remarkable witness thus stated on page 102, that at the time of the accident he was "carrying wood forward," and was coming back for another armload; also, on page 104, that he "was rolling a barrel of oil out of the way." He thus endeavored to clear himself from being suspected of being the guilty person. His testimony is important chiefly as showing that his testimony too, is mostly untrue.

Another reason that existed in the mind of the Court for thinking it was not a stevedore was—we quote from the opinion of the Court, page 161—that "each one of them related where he was working at the time of the accident, and not one of them was on the main deck except the burton-tender (Jno. F. Davidson), and he testified that he was at the main hatch, not the fore hatch, some fifty feet away, thereby precluding any inference that it might

have been one of the stevedores who stepped on the hatch covers."

But only fourteen stevedores have testified, and according to their own admissions, there were several more. O'Donnell said (p. 49), that there were in the lower hold, "to the best of his knowledge, twelve men"; King said (pp. 104, 105), that he was between decks, and that "on my side there were three men and the foreman," and "on the other side, to my knowledge, there were two men." That would make (12 plus 5) seventeen men, besides Davidson, the hatch-tender O'Donnell (p. 55) on the main deck, and Goble (p. 74) the engineer on the wharf. That would make nineteen stevedores, five of whom have not testified.

Moreover, it not only does not seem impossible, but it is altogether probable, that Davidson was the man who trod on the cover. He was the burton-tender. His position of duty then was at the fore hatch, the only one through which the cargo was being stowed.

O'Donnell testified directly (p. 48) that at that time "the hatch-tender was on the forecastle deck, of course," for he supposed that he was at his post of duty, and testified so, simply because he supposed so. That fortifies our belief that he, as well as others, was careless in testifying. That statement he repeats on redirect examination (p. 55):

"Q. Where was the hatch-tender?

A. He was on the forecastle deck."

But O'Donnell was between decks, and it was impossible for him to swear to the position of Davidson. But Davidson not being altogether intelligently forewarned, was not intelligently forearmed. He inadvertently confessed that he was not where O'Donnell swore he was. He was not on the forecastle deck. He testified (pp. 68, 69), and we quote his entire testimony:

"By Mr. PRICHARD.—Q. What is your business?

A. Burton-tender.

Q. Were you on the ship 'Joseph B. Thomas' in April 1892, when Mr. Jensen was injured? A. Yes, sir.

Q. What part of the ship were you in at the time?

A I was at the main hatch, splicing the hook in.

Q. In what part?

A. On the upper deck. We had a stage built over the top of the hatch. I was splicing it in, and I heard a halloo, and I went forward, and there was a couple of men had this stage slung in between decks. Mr. Nielson was one and Mr. O'Donnell helped him.

Q. That is, they were carrying Mr. Jensen out?

A. Yes, sir; I hallooed to the engineer to go ahead.

Q. You did not see the accident? A. No, sir.

Q. You did not see the barrel?

A. No, sir; if I had seen it there I *would have taken it away*
away.

Q. Do you know who took the hatch coverings off that morning?

A. I don't know; I didn't see anybody lift them.

Cross-Examination.

By Mr. EDMUNDS.—Q. You were at the main hatch?

A. Yes, sir.

Q. That would be quite a distance in the ship from the fore hatch?

A. I couldn't tell you exactly how far.

Q. Nearly fifty feet, wouldn't it?

A. I *couldn't tell you* that exactly."

He thus admitted that he was not where he should have been, and swore he was "at the main hatch splicing the hook in." That located him, certainly, on the main deck where the coverings were. He said: "We had a stage built over the top of the hatch." This manifestly means, a stage built over the main hatch. But in the next sentence he said: "a couple of men had *this stage* slung in between decks." He also said: "I was splicing it in, and I heard a halloo and went forward." This, however, is vague, and confuses the time of the accident with what was evidently later, when he was needed to attend the burton, at the time "they were carrying Jensen out." But he was on the main deck before that time, both just before and when the accident happened.

King, a stevedore, confirms us in this belief. He testified (pp. 107, 108)):

"Q. You were loading with steam power?

A. Yes, sir.

Q. Did you have a burton-tender on deck?

A. Yes, sir.

Q. Was he on the main deck? A. Yes, sir.

Q. Right at the hatchway?

A. Yes, sir; right at the hatchway [of course, the fore hatchway].

Q. Did it take more than one man for that?

A. No, sir. Just one man. He has a whistle and gives the signal when to go ahead and when to come back.

Q. But you had to have somebody to stop the swing. Was he on the wharf?

A. There was an engineer on the wharf.

Q. He cannot stop the swing—somebody must do that on deck?

A. The burton-tender on deck generally has a rope made fast to a ring bolt, and throws it around the fall and steadies it that way himself.

Q. That is what he was doing that day, was it?

A. Yes, sir.

Q. Do you remember upon what side of the hatchway he was standing? A. Yes, sir; the port side."

As Davidson then was on the main deck at and after the time of the accident, and as both of the mates swear that the man who trod on the covering was a stevedore coming from the watercloset, and Fitzgerald testified it was a full grown man, not a boy, the conclusion that it was Davidson seems to be irresistible. The occasion of his passage across the deck was a natural and probable one. He was undoubtedly returning to it when he trod on the cover-

ings and upset the keg. If he did it, he did subsequently what was natural for the ordinary man. He was afraid that some one had been hurt by the keg, and he hastened on aft, and when they "hallooed," as he said, for the burton-tender to come to his post, when they were carrying Jensen out, he had to come from the place of his retreat, possibly near the main hatch, fifty feet away. He afterwards excused himself for being there by saying he "was splicing the hook in." Entire honesty and good faith would have furnished further testimony of the necessity for his absence from the fore hatch, and for his presence at the main hatch where no one else was working, of what hook he was splicing in, and for what purpose. The truth is, he had no business at the main hatch then, for there was no stowing there and no need of a hook. Without any explanation, but only the bare facts established by the testimony of himself and the two mates, there is left no other conclusion than that Davidson was the man. The testimony of both of the mates had been taken several months before that of Davidson, while that of Davidson, if taken on the same day with that of Fitzgerald, was nevertheless taken subsequent thereto, the conclusion as to the person who trod on the coverings pointed directly to him. Yet he was not asked by libelant's counsel, how long he had been at the main hatch where he was hallooed to, nor if it was he who was coming from the water-closet just before the accident, nor if it was he who trod on the coverings.

It is no way probable that if asked by the claimant's counsel he would have made confession of any such controlling facts, but the burden was on libelant not only to prove specifically his charges, but to free from suspicion one of his own witnesses who had become involved by the testimony of the mates, Fitzgerald, King, and the witness (Davidson) himself. The silence of that witness, where explanations were demanded from him, whether dictated by the discretion of libelant's counsel or by his own fear of detection, is an unanswerable argument in favor of claimants, and, we claim, decides the query touching the person who upset the keg into the hold.

We now draw the attention of this Court to the fact that after the depositions of witnesses of libelant had been taken, and claimant's counsel were informed of the web which was evidently intended to be woven from the inconsistent, unintelligent, careless, or mistaken, but, in most cases, palpably untrue statements made by the stevedores, said counsel, at their earliest opportunity, to-wit, on the 9th day of November, 1893 (p. 135), recalled Hannum, to contradict the improbable, untrue, and scarcely cunningly devised story told by the two persons unconnected with the ship, Fitzgerald and Gray, and of whose presence and errand, and demand for a piece of rope on the vessel, not one of the stevedores—witnesses of the libelant—gave any confirmation, or any sign of knowledge whatever. Said counsel called also, at the same time, the master of the vessel and the carpenter, to

add such negative testimony as would free the claimants from any suspicion of disinclination to meet the issue, or to reveal to the Court every fact within the limits of possibility.

In the second deposition of Henry B. Hannum, the third mate, he testified directly and unequivocally (pp. 136 et seq.) as follows:

"Q. In October, 1892, you were examined as a witness on behalf of the claimants in this case; since that time have you been to sea? A. Yes, sir.

Q. When did you last sail from this port?

A. About the midde of October, 1892.

Q. When did you return back to this port?

A. The 17th of September of this year.

Q. Are you still connected with the ship 'J. B. Thomas' as one of the company of that ship? A. Yes, sir.

Q. In what capacity? A. Third mate.

Q. When you testified in this case in October, 1892, you stated that at the time that Jensen was injured you and the second mate, and one of the ship's boys, and one of the stevedore's men, were under the topgallant forecastle; now, at that time were there any other persons under that topgallant forecastle except those that you mentioned at that time? A. No, sir.

Q. Just at and immediately before the time that the cask fell into the hold, by which Jensen was injured, had the second mate come up from the between decks?

A. No, sir.

Q. If just at the time that the cask fell into the hold, by which Jensen was injured, the second mate came up from the between decks through the fore hatch, could you have seen him? A. Yes, sir.

Q. If any stranger from the shore had come in on the main deck under the topgallant forecastle, and had asked the second mate to give him a piece of rope, in your opinion, would you have heard him? A. Yes, sir.

Q. Did any person from the shore come on board the ship just before the accident happened, under the topgallant forecastle, and request the second mate, or any other person there, to give him a piece of rope?

A. No, I didn't see anybody, and there was nobody there.

Q. Did any person belonging to the ship, as one of the company of the ship, tread on the hatch covers, by reason of which the cask by which Jensen was injured was precipitated into the hold? A. No, sir.

Q. What means are there of getting from the between deck on to the main deck under the topgallant forecastle?

A. There are no means when the hatches are off. When the hatches in the lower between decks are off there are no means of getting up.

Q. I am not speaking of lower between decks, but of first between decks; now, suppose you had at the time this accident happened been in the between decks and wanted to come upon deck, how would you come up, through what hatch? A. Through the main hatch.

Q. What were the means of getting on the main deck from the between decks through the main hatch?

A. You come up a ladder.

Q. At the fore hatch under the topgallant forecastle, what means were there of getting from the between decks on to the main deck?

A. There are steps there when the hatches are on between decks.

Q. What means are there of getting from the between decks on to the main deck through the forward hatch when that hatch is open?

A. There are two hatches, and a hatch on the main deck. There is no way of getting up unless the hatch in the between decks is on.

Q. When the forward hatches in the between decks are on, what means is there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is steps put there.

Q. At the time that this accident happened were the between decks forward hatches open or closed?

A. Open.

Q. And being open, what means were there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is no way of getting there.

Q. Do you know about what the distance is from the upper between deck to the main deck?

A. About nine feet.

Q. Then if they were working the forward hatch down into the lower between decks, and a person in the between decks wanted to come on the main deck, he would have to come up through the main hatch? A. Yes.

. . . . . .

Q. A witness by the name of John F. Fitzgerald has testified in this case as follows: That at the time of the accident 'the mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he trod on that hatch.' Is that true? A. No, sir.

Q. He also testifies the man who trod on the hatch was a man belonging to the ship; is that true? A. No, sir.

Q. At this time was there any mate on board the ship except the second mate, and yourself as third mate?

A. No, sir.

Q. The first mate was not aboard? A. No, sir.

Cross-Examination.

Mr. Holmes.—Q. If the witness Fitzgerald, in his testimony just quoted to you, had said 'second mate' instead of 'mate,' then that testimony would be true, would it not? A. No, sir.

Q. Were you working in loading the 'J. B. Thomas' through the main hatch at the time mentioned?

A. No, sir, not through the main hatch.

Q. Don't you sometimes load through both hatches at the same time?

Mr. Andros.—Objected to as immaterial as to what they sometimes do.

A. Yes, sir.

Q. How is it that you can now recall that you were not on the day mentioned loading through the main hatch, as well as through the forward hatch?

A. We had only one gang of stevedores.

Q. How many stevedores are there in a gang?

A. I don't know.

Q. Then how do you know there was only one gang of stevedores? A. They were only working one hatch."

On redirect examination (p. 147) he testified:

"Mr. Andros.—Q. When the stevedores went below to work cargo, through what hatch did they go, through the main hatch or forward hatch, or the after hatch?

A. Through the main hatch.

Q. When they got through work, or whenever they wanted to come on to the main deck, through what hatch did they come on to the main deck, whether the main hatch or the forward hatch?

A. Through the main hatch.

Q. At the time this accident happened were they loading cargo through the forward hatch? A. Yes, sir."

This second deposition of the third mate, whose previous testimony has not in any single statement been disputed, is sufficient, in corroborating the testimony of Peterson, to annul any effect of the testimony of Fitzgerald or of Gray. We ask this Court to notice that the third mate has stated (p. 226) that "the stevedores went below to work cargo, through the main hatch"; that "when they got through work, or whenever they wanted to come to the main deck, they came through the main hatch," because, as he had previously stated (p. 223), the means of egress from between decks was through the main hatch by "a ladder." This strengthens our contention that, when the mates were aboard ship, apparently only as ship-keepers, while the principal work to be done was stowing by the stevedores, and the ship had no crew, it is incredible that the second mate, in his leisure, should forego the easy ascent by the ladder, where he needed no assistance, but should rather undertake to climb a stanchion, where he would require the assistance of O'Donnell from below and of some chance person on deck, while he would run the risk of losing his hold and falling, at least twenty feet. This testimony thus sustains us in the contention that the second mate did not climb up the stanchion, and was not helped up from between decks, as told by libelant's witnesses. It aids us in showing, by direct, uncontradicted testimony, that neither Fitzgerald nor Gray were on board the vessel at the time of the accident, or at least were not where they claimed to have been.

The testimony of the carpenter, Ole Larsen (p. 147), is only to show that, though on the ship, he did not see the accident. The testimony of Captain Lermond (p. 148), confirms the earlier testimony of the third mate, that the two boys on the ship had been discharged immediately after the arrival of the ship in San Francisco, several days before the libel was filed, and had not been seen since. This is all the testimony offered by claimants, and we contend that it is sufficient fo rtheir defense. But in the opinion of the District Court, its effect is greatly weakened, and that of libelant strengthened, by reason of an omission to produce the two boys, part of the ship's small company. Indeed, a principal, and apparently the controlling, reason which moved the Court below to accept a version of the event given by witnesses of libelant and for distrusting the testimony on behalf of claimants respecting the person by whise act it was that the keg was precipitated into the hold of the ship, is expressed in the opinion on pages 161 and 162; and on page 167 the Court repeats:

"The failure to call these two young men not only leaves us without their testimony on this point, but, under the rule of evidence heretofore referred to, raises a presumption against the claimants that their testimony, if produced, would have been unfavorable."

The principle of law invoked by the Court on which this presumption is based, is, beyond controversy, correct, but with all proper deference to the views of the learned

Judge, we think that a more careful examination of the testimony will disclose the fact that when the opportunity arose to take testimony on behalf of the claimants, these young men were beyond the reach of the claimants and of the process of the Court.

The ship arrived at San Francisco on the 19th day of September, 1892. The libel was not filed until the 10th day of October following, twenty-one days after the ship arrived. The crew were paid off on the 22d, 23d, or 24th of September, three, four or five days after the ship arrived, and they left the ship the day after they were paid off, sixteen, seventeen or eighteen days before the libel was filed.

Peterson, the second officer of the ship, whose deposition was taken on behalf of the claimants on the 17th of October, 1892, on page 111, testified:

"Q. What time did you arrive in San Francisco?

A. We arrived here September 19, 1892, on a Sunday night."

Hannum, the third officer of the ship, testified on his redirect examination (p. 134):

"Mr. Andros.—Q. Are those boys that were under the topgallant forecastle at the time this accident happened on board the ship yet? A. No, sir.

Q. When did they leave? How long ago?

A. The day after we were paid off. The 23d or 24th of last month.

Q. September? A. Yes, sir.

. . . . . .

Q. Besides yourself, the second officer, and the carpenter, who else is on board?

A. Aboard the ship now is the steward, the cook, the captain, first, second, and third mate, and the carpenter, and the painter.

. . . . . .

Mr. Holmes.—Q. These two boys that you have spoken of are still in the city, so far as you know?

A. No, sir, I don't know anything about them.

Q. So far as you know they are?

A. So far as I know.

Mr. Andros.—That is, you don't know where they are?

A. No, sir, I don't know. No one told me anything about them, and I have not seen them.

Mr. Holmes.—You don't know that they have left the city?

A. No, sir, I don't know anything about them since they left."

Captain Lermond testified that he was master of the ship "J. B. Thomas" on her voyage from Philadelphia to San Francisco in 1892.

"Q. Were you on board of her when a man by the name of Jensen, a stevedore, was injured on board of her?

A. No, sir.

Q. Did you have two boys on board of her who came to San Francisco? A. Yes, sir.

Q. How long after you arrived in San Francisco was it that those boys left the ship, if they did leave her?

A. Three or four days, I think.

Q. Did they ever return to the ship and rejoin her?

A. No, sir.

. . . . . .

Q. Do you know the names of those two boys?

A. On the articles they were Ete Watten and Victor Russ.

Q. Do you know whether Ete Watten ever went by the name of Hans Watten?

A. Yes, he did on board the ship. That was the name he went by altogether on the ship.

Cross-Examination.

Mr. Holmes.—Q. Did these two boys leave when they were paid off?

A. No, sir, a day of two after. They were paid off on the 22d, I think, of September, and they stopped two or three days after that on board the ship.

Q. And they were paid off how many days after the ship arrived?

A. The third day, I think; I am not certain.

Q. Were they paid off at the same time the rest of your crew were paid off? A. Yes, sir.

Q. At the shipping commissioner's office?

A. Yes, sir.

Q. Did you occasionally see those two boys, or either of them, after they left the ship?

A. I think I saw one of them along the side of the ship once; I am not sure; I think I saw him alongside of the ship once, this Hans.

Q. Any more than once? A. No, sir, I think not.

Q. Did you ever see the other one?

A. No, sir, never."

In November, 1893, the ship was again in San Francisco, and the witness Hannum was again called by the claimants for the purpose of rebutting some parts of the testimony taken on behalf of the libelant. In the course of his examination he testified.

"Q. Do you remember the names of these two boys who were on board the ship at the time this accident happened? I mean the two ship's boys.

A. I remember one of them.

Q. What was his name? A. Victor Russ.

Q. How long, or about how long, after the ship arrived here in 1892 was it before these two boys left the ship, if they did leave it?

A. I believe it was about a week.

Q. Do you know what became of them, if they went to sea or not, of your own knowledge?

A. No, sir." (Record, p. 139.)

From the foregoing testimony it is evident that the two boys were, as well as the rest of the crew, paid off in San Francisco, and left the ship at least two weeks before the libel was filed, and that neither the master nor the third officer ever saw them again or knew whither they went.

The claimants could only ascertain from the officers of the ship if these two members of the crew were still connected with her, and, if not, whether they had any knowledge of where they were; there was no one else, so far as appears, to whom they could apply for information. After a sailor has been paid off and left a ship, it is quite as impossible to locate him as it would be to locate a bird of passage after it has entered upon its spring or autumn flight.

Now, the claimants were not called upon to take any testimony until a suit was pending wherein testimony could be taken. Whether or not an action would be commenced by the libelant, or, if to be commenced, what would be the alleged facts on which it was to be founded, they were, of course, ignorant. There was nothing to which they could respond, either by pleadings or facts. Up to the time, then, of the filing of the libel, they could not be guilty of laches in not taking the testimony of these two boys, and when it became necessary to take defensive testimony, clearly these had got beyond their reach. Under these circumstances no presumption should be indulged in against the claimants, that the testimony of these persons, if taken, would have been adverse to their contention.

In the natural course of events, we submit, there is scarcely a presumption that the boys, if present to testify, would have testified adversely to the claimants. Our confidence in the truth of the narration by the mates has

made the unavoidable deprivation of the testimony of the boys a source of regret, for we believe their testimony would have fully sustained the mates.

From this plain narrative by the second and third mates of the events which culminated in the accident, we submit that there can be no other conclusion than that, if the accident was occasioned by the manner in which the covers were laid, then it was occasioned by the stevedores who were in charge of the hatch and its vicinity, including space enough of the deck on which to pile the covers; that they piled the covers, and if the keg remained there most of the day, it was with their knowledge and permission; that there was no duty on the part of the owners to oversee the work of the stevedores, nor any duty in them to exercise a care for the protection of the stevedores—the only ones who might need protection—which they were too careless to exercise themselves; that after the stevedores had piled the covers, not one of them could tell whether they were properly piled, and, if they were insecurely piled, they gave no warning of their insecurity; that therefore, leaving a keg on the further end of the covers, was in no way an act of negligence, under the circumstances developed by the testimony herein.

VII.

THE LAW APPLICABLE TO THE CASE.

Respectfully differing, as we do, from the learned Judge of the District Court, both as to his conclusions from the facts and the law applicable to them, we beg

leave to first call the attention of this Court to our view of the law, and to the cases which appear to sustain that view, before referring specifically to the principles relied on and to the cases cited in the opinion.

The Court will remember that this is an attempt to throw the responsibility, not on the person who committed the act, which directly caused the injury, but on the owners of the vessel on board of which the injury was received. The law in such case demands proof that the owners "violated some duty," and were the cause of the injury. We submit that this proof has not been offered.

"In an action for injuries caused by falling down the stairs of defendant's elevated railroad station, plaintiff's evidence merely showed that her fall was caused by catching her foot on one of the steps, and that afterward, the rubber covering on one of the steps was discovered to be loose; but no one saw her trip on the loose cover, and there was no evidence as to its condition before the accident. Held, that the complaint was properly dismissed for want of proof of negligence."

Millie v. Manhattan Ry. Co., 31 N. Y. Supp. 801.

If there was any insecurity, it was caused by the stevedores, and the result was primarily caused by them. If the insecurity arose from the carelessness of the stevedores, the insecurity was latent, and was the greater negligence of the stevedores. The stevedores having practically entire management of the part of the ship where they were at work, it was not the duty of the ship to follow the stevedores to see if they laid the covers se-

curely for their own protection, or if they laid them so carelessly as to set a trap for one of their number.

So far as danger to the stevedores themselves from their own acts was concerned, it was not the duty of the ship to see to it that the covers were made secure, or to make good the fault of the stevedores, or to secure the stevedores themselves against the improbable result of their own action.

The ship was being laden by a stevedore, under contract, as alleged in the libel, and the person injured was one of his gang (p. 6), not belonging to the ship.

We claim that the rule applicable here is that which is laid down in Shearman & Redfield on Negligence, section 79, that "a contractor is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce," and "it follows that his employer is not responsible to third persons for his negligence, or for the negligence of his servants, agents, or subcontractors, in the execution of the work."

See cases cited under section 79.

"Where the negligence was not that of the master, but of an independent contractor, or of the stevedore having charge of the loading of the ship, the latter, and not the owners, is liable."

Bonnet v. Truebody, 66 Cal. 509.

Dwyer's Admx. v. National S. S. Co., 4 Fed. Rep. 493.

The Victoria, 13 Fed. Rep. 43.

The case of Walsh v. The Ship Babcock, 12 Sawyer, 412, is to the same effect. In that case "an employee of the master stevedore, who was loading a vessel under contract, was injured by stepping into a small trimming hatch, in the between decks, while engaged in stowing a cargo. The light in the between decks was dim, and libelant did not know of the existence of the hatch, or that it was uncovered. When the vessel was turned over to the master stevedore to be loaded, this trimming hatch was covered. It was subsequently uncovered by the stevedore's foreman. Held, that the vessel was not liable for the injury."

The analogy between the facts of that case and the one at bar seems complete.

We claim, then, that leaving the keg in the position disclosed by the evidence was not in itself negligence; for

A. There was no legal duty on claimants to exercise control.

1. This duty lay directly on the stevedores.

2. Whatever legal duty there was, if any, on the claimants, did not extend to unusual risks.

B. There was no failure, on the part of the ship, to exercise control necessary under the circumstances.

a. There was no probability of injurious consequences from placing the keg.

b. The position of the keg was not inherently dangerous.

c. The stevedores themselves saw the keg without anticipating danger.

d. The injurious consequences did not happen in the natural or probable course of affairs.

e. Whatever danger there was was apparent to the stevedore's employes.

This is upon the assumptions (1) that the covers had been laid properly when they would, according to the evidence of the second mate quoted above, have lain firmly, and (2) that, as the testimony shows, it was the custom of the stevedores to take off and pile up the hatch covers (O'Donnell, p. 53), and did so in this case (p. 46).

Applying the law to these facts, we submit that they fail to make a case of negligence against claimants. The elements of negligence are two in number: (1) A legal duty to exercise control; and (2) a failure to exercise the control necessary in the circumstances of the particular case. (Beven, Neg., p. 18.) No one of these elements is disclosed by the circumstances of the present case.

For the purpose of receiving and stowing her cargo, the stevedore had possession of the ship. Every part of her necessary for the proper performance of this service—her hold and the hatchways leading to it, the covers when taken off, and sufficient of the deck on which to pile them—were under the exclusive control of himself and his servants. It was, therefore, incumbent upon them to

carefully observe any object placed, no matter by whom, in dangerous proximity to the hatches or other parts of the ship where they had to work, and to remove it. There was nothing to prevent the stevedores from seeing and removing this keg from the hatch covers if they deemed it necessary or prudent.

If the keg stood in such a place as to arouse anticipation of injury to those working in the hold of the ship, the stevedore's men who saw it there were under a duty to guard against such danger. The fact is, however, we submit, that to neither stevedore's nor ship's men even the possibility of an accident was suggested by its position; but, on the contrary, they deemed its position perfectly safe. From the testimony of libelant's witnesses it would appear that every person who came on board noticed the keg. The two strangers testified in the case that they saw, when they got on board, its position on the hatch covers, so that they were able to render an astonishingly minute account of its exact location (Fitzgerald, p. 35; Gray, p. 98). This would make it probable that the persons who were working all day about the ship could not have failed to notice it. Its position suggested no danger to any one; else the stevedores who were most directly interested in keeping the hatchway clear would certainly have set it aside. Indeed, Davidson, the hatchtender, libelant's witness, swore (p. 69) that he didn't see it at all, and if he had seen it where described to be, he would have taken it away. That witness cannot be in

all respects credible, but if he is in this respect, his testimony would make it certain that it was not in close proximity to the hold where he stood all day.

The legal duty of guarding against a possible danger which, libelant charges, was due to negligence on the part of the ship, lay upon the men who had the control of the hatches while the loading of the ship proceeded. These men had allowed the object to stand in its position for hours. It is true that, if the ship's men had placed it in a dangerous position, where it did mischief, before the stevedores had a chance to become aware of the threatening danger, the case might be otherwise; but the evidence discloses a very different state of things. We must look upon the position of the keg before the accident happened, instead of criticising it after its occurrence. It will not do to say the accident happened, hence the position was dangerous, and the act of placing the keg on the hatch covers was negligence. The question here is, could the happening of the injury be reasonably foreseen? If so, we claim it was the duty of the stevedores to anticipate and prevent it.

Not only was it their duty to exercise control over the keg, but more than this; it was not the duty of claimants to protect the contractor's men against unusual and unforeseen risks. Had the accident not happened, no one could have dreamed that the position of the keg subjected libelant or any one to any risk whatever. The fact alone that the *stevedores* left it standing where it was, shows

sufficiently that the risk was unforeseen by them; but all the other facts appearing in evidence show how unexpected and unusual this accident was which produced the injury.

Claimants have thus established the proposition that the first element of negligence, namely, the existence of a legal duty to exercise control, fails in two respects: First, because that legal duty was directly incumbent upon the stevedore and his employes. Secondly, because the legal duty with which claimants are chargeable does not extend to unusual and unforeseen risks.

Falls v. Railroad Co., 97 Cal. 114.

"The injury resulting from the defendant's negligence was out of the *ordinary sequence* of events, and, therefore, such as a person exercising proper precaution and forethought, under the circumstances, could not have anticipated or expected."

B. & I. R. R. Co. v. Sneider, 19 Ohio St. 410.

Railway Co. v. Elliott, 5 C. C. A. 347; S. C., 12 U. S. App. 381.

"The practical construction of proximate cause by the Courts is a cause from which a man of ordinary experience and sagacity could *foresee* that the result might probably ensue."

Shearman & Redfield on Negligence, sec. 10.

No testimony points out such to be a fact herein. "The general rule is, that a man is answerable for the conse-

quence of a fault which is natural and *probable*, but if his fault happen to concur with something that is *extraordinary* and unforeseen, he will not be liable."

McGrew v. Stone, 13 Penn. St. 436.

There could be nothing more extraordinary or unforeseen than the act of the stevedore who ran and threw his weight on the hatch covers so as to throw into the air and down into the hold a keg standing on them at a distance of six feet.

B. It can be shown with equal conclusiveness that libelant's case is lacking in the second element necessary to constitute actionable negligence on the part of these claimants in this respect: That there was no failure on their part to assume and exercise any control necessary under the circumstances of this case.

1. There was no probability of injurious consequences attached to the placing of the keg. In the nature of things, the position was not inherently dangerous. A small keg standing on one head, with the other out, has its center of gravity very near the bottom, and would be likely to maintain its equilibrium against any ordinary contact. It would certainly not fall over of its own motion, and it would probably not yield to an ordinary disturbance. It would, of course, be impossible to determine the probability of its falling over with any degree of scientific accuracy; but it can be reasonably maintained that in the ordinary course of events, the probability of

its remaining in an upright position, was greater than the probability of its falling over. In other words, it was improbable that the keg should fall; ordinary care and prudence could not foresee that this probability would be overcome by the advent of an extraordinary cause. But more than that; if we assume that the covers were properly laid, and, therefore, formed a reasonably solid basis for the keg, it would, in all probability, not have been pitched into the hatch, if some ordinary cause had upset it. It stood away from the coamings; the plane upon which it stood was several inches lower than the upper edge of the coaming. Had the keg been simply tipped over, it would, in all probability, have remained on the covers without falling down the hatchway. It therefore becomes apparent that, first, probably the keg would not fall over; second, even if it should fall, that it would not fall down the hatch. In other words, its position was not *inherently* dangerous, so as to charge these claimants with negligence in placing or leaving it there.

But the fact that no one, neither ship's employes nor stevedores, foresaw any danger from its position, appears clearly in evidence. The object stood there for hours, while the regular work of loading was going on. One of the stevedores testified that he saw it there. We have shown that the burton-tender, whose position, while the work was in progress, was on the forecastle a few feet above the keg, said he saw it there. The other stevedore's men, when they came on deck at lunch time, if at no other

time, must have seen it there. The work of loading went on through the day; the burton-tender, whose duty it is to steady the swing of the loads did not anticipate that one of the loads might swing out of the coamings and precipitate the keg into the hold. As a matter of fact, the ordinary course of business did not bring about the accident and injury. Now, does not the fact that some of these men saw the keg without removing it, raise the strong inference that an ordinary man would not, and could not, have foreseen that an injury might be the result of the position of the keg? Do not these facts prove that there was no failure, on the part of the claimants, in the exercise of their control over the keg necessary under the circumstances?

There was, then, no probability of danger suggested by the position of the keg. It is not claimed that there was not some possible danger. People working underneath a hatch or shaft are necessarily exposed to the possibility of danger. If there was any danger, it was obvious to every person concerned. The stevedores knew of the surroundings in which they worked. If there had been any hidden danger, any trap, there would have been a strong duty incumbent upon the ship to take great precautions. But the dangers liable to arise from moving about under an open hatch are palpable, visible and notorious, and hence it was, under the circumstances, the duty of the stevedores who had charge of the hatch to take such precautions as were reasonable to prevent mischief.

B. 2. The fact that a keg belonging to the ship fell from her deck into the hold and injured the libelant is not, under the proofs, sufficient to raise a presumption of negligence on the part of the claimants or their servants.

The principle that the mere happening of an accident raises a presumption of negligence, is perhaps nowhere better stated than in Transportation Co. v. Downing, already cited, and in Scott v. London Dock Co., 3 H. & C. 596, cited by the Court in Transportation Co. v. Downing.

In Scott v. London Dock Co., Erle, C. J. said: "There must be reasonable evidence of negligence. . . . . But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

From this statement of the law it appears that two conditions must be satisfied, in order that the mere occurrence of an injury be sufficient to raise a presumption of negligence:

1. The injurious agency must be under the management of the defendant.

2. The accident must be such as, in the ordinary course of things, does not happen, if those who have the management use proper care.

It is submitted that neither of these two conditions is satisfied in the present case.

As to the first requisite, the evidence in the present case discloses the fact that the object which produced the injury was not under the management of claimants in the sense in which the word "management" is used in the cases cited above, and in the other cases supporting the doctrine of *res ipsa loquitur*. In these cases, "management" means immediate and active management or control of the thing by the defendant at the time it caused the injury.

The maxim *res ipsa loquitur* does not apply in this case. There is no need to resort to presumption. The facts are all in proof as to how the accident happened. An "explanation" has been given. It was occasioned by the falling of a keg placed upon some of the hatch covers, and precipitated into the hold by some one stepping on these covers. As to these facts, then, there is no need of resorting to presumptions. The fact that the evidence as to who stepped on these hatch covers—whether a servant of the independent contractor or a servant of the claimants—is conflicting, does not raise a presumption that it fell through the negligence of the claimants. Whether it was negligently placed on the hatch covers is not a matter of presumption, for it is in proof as to how it was placed and by whom. It is not a matter of presumption what caused it to fall, because it is in proof that someone stepped on the hatch covers; as to who it was that stepped on them there is a conflict of testimony. This is to be resolved not by a presumption that the claimants were negligent, but by presumptions growing out of the evi-

dence as to who it was that did the proximate act of stepping on these covers that precipitated the keg into the hold of the ship.

3. If the placing of the keg on the hatch covers be negligence, claimants are not liable for the injury.

We have already submitted that the mere act of placing the keg in the position disclosed by the evidence cannot be construed into an act of negligence *per se;* but assuming that this act indicated carelessness on the part of the servants of the claimants and that injury to the libelant grew ultimately out of it, still these facts are not sufficient to fix the responsibility for the injury upon the claimants. It must be shown that the act of the claimants was the proximate cause of his injury.

In the case of Sheridan v. Bigelow, 67 N. W. 732, 193 Wis. 426, Marshall, J., after stating the facts of the case, says: "The verdict is fatally defective for want of any finding on the subject of proximate cause. It finds specially that defendant did not exercise ordinary care in the operation of its train, and in keeping its track free from obstructions; that plaintiff was injured, and was not guilty of any want of ordinary care, which contributed to produce such injury. But that is not sufficient to cast upon defendant the consequences of such injury. It should not be forgotten, in such cases, that the mere fact that one person is injured by the failure to exercise ordinary care on the part of another, in respect to some duty which such other owes to such person, does not render

such other liable therefor, unless such injury was the natural and probable result of such negligence, and one which, in the light of attending circumstances, such other ought reasonably to have foreseen might probably occur as a result of such negligence. This is absolutely an essential element of proximate cause requisite to actionable negligence. . . . . As said in McGowan v. Railway Co., 64 N. W. 891, in effect, the facts constituting proximate cause, i. e., not only that the injury was the result of want of ordinary care on the part of the defendant, but that, in the light of attending circumstances, a person of ordinary intelligence might have expected that such an injury might probably occur as a result of his failure to exercise ordinary care, are indispensable in order to constitute a continuous succession of facts so connected as to make a complete chain, a natural whole, reaching from the negligent act down to the injury, and producing it, so as to show that such negligence and the injury stand in the relation of cause and effect, so as to establish defendant's legal liability for the consequences of it."

The rule as to proximate cause is thus stated in Milwaukee & R. R. Co. v. Kellogg, 94 U. S. 469: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some *new and independent cause* in-

tervening between the wrong and the injury? . . . . It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

In Henry v. Southern Pac. R. R. Co., 50 Cal. 183, Mc Kinstry, J., says: "A long series of judicial decisions has defined proximate or immediate and direct damages to be ordinary and natural results of the negligence, such as are usual, and therefore as might have been expected."

"The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression." (Grove, J., in Sharp v. Powell, L. R. 7 C. P. 253.)

Now, the act complained of in the present case, namely, the act of placing the keg into the position shown by the evidence, was not the proximate cause of the injury to libelant, for two reasons: First, because this act was, in itself, only a condition and not a cause, of the accident; second, because a new cause intervened between the act and the result, a cause which in this case, was the real *causa causans.*

First, the position of the keg was certainly not so closely connected with its fall through the hatch that the fall could be considered the natural and probable consequence

of the act of placing it near the hatch. If the evidence showed that the keg remained "nicely poised" near the opening, the case might be different. By placing it in the position where it was, no force was put in motion; it rested with its flat end on a flat surface, and the chances were exceedingly great that it would maintain its position. Its liability to fall down the hatch was only proved by its actually falling down. The act of putting it in the vicinity was not sufficient to bring about the injurious result. In other words, the act of placing it there had nothing to do with the accident. The latter was in no sense the proximate, necessary, or probable result of the former. The same consequence might have occurred, even if the keg had been placed upon the level of the deck. A person stumbling against or otherwise interfering with it might have so disturbed it as to have precipitated it down the hatchway, even if it had been at a greater distance from it. The mere fact of the position of the keg was not, therefore, the proximate cause of the injury, failing, as it does, in these two particulars, to show (1) that the injury was the natural and probable consequence of the alleged negligence; and (2) that it was such as might, or ought to have been, foreseen in the light of the attending circumstances.

On the doctrine of proximate and remote causes, Mr. Justice Miller, in Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, says: "One of the most valuable of the criteria furnished us by these authorities (i. e., cited by counsel in the case), is to ascertain whether any new cause has

intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

See, also, Hoag v. Railroad Co., 85 Pa. St. 293.
L. Wolf Manuf. Co. v. Wilson, 152 Ill. 14.
St. Louis & S. F. Ry. Co. et al. v. Bennett, 16 C. C. A. 300.
Railway Co. v. Callaghan, 6 C. C. A. 347.
Railway Co. v. Moseley, Id. 641.
Insurance Co. v. Melick, 12 Id. 544.

Again, in Milwaukee etc. Railway Co. v. Kellogg, 94 U. S. 475, above cited, the Court said: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause."

In the case at bar, the fact of the alleged negligent act and the occurrence of the unfortunate event are dissevered by a new and independent agency, namely, by a person stepping upon the hatch covers. The proximate cause of the accident was not the position of the keg, but the subsequent treading of some person on the hatch-covers. The facts in this case are very similar to those

in Fitzgerald v. Timoney, 34 N. Y. Supp. 460. There it appeared, in an action for personal injuries, caused by the fallof plastering from the ceiling of premises leased to plaintiff by defendant, that defendant contracted with a third person to put a new floor in the apartment above that occupied by the plaintiff. An employe of the contractor testified that, while he was engaged in the work, his foot slipped and went through the ceiling, causing a lot of plaster to fall. It was held, that defendant was not liable, though the plaster on the ceiling was insecure, and liable to fall at any time.

"The uncontradicted evidence shows," says the Court, "that the impaired condition of the plastering was not the proximate cause of the injury. It is true that the ceiling might have fallen later through inherent defects, if not repaired, but the Court cannot speculate as to the time when, or that any person would be injured thereby. The undisputed evidence shows that the proximate cause of the injury was the slipping of the contractor's employe, thereby pushing his foot through the ceiling, displacing a large portion of the plaster."

In the case cited the premises were left by plaintiff in an obviously dangerous condition; the probability of the falling of the defective ceiling was certainly greater than the probability of the falling of a keg which was located not directly overhead, but stood at some distance from the hatch. The facts of the case cited are, therefore, more favorable to the establishment of actionable negligence

than those of this case. Herein the *causa causans* was the fact that some one trod on the covers and thereby precipitated the keg.

The learned Judge of the District Court, on page 163, said: "But it is immaterial, in my opinion, whether the person who stepped on the hatch cover was one of the young men who was connected with the vessel, or whether it was one of the stevedores, if the act of placing the keg on the hatch cover to dry was a failure to observe ordinary care, or, in other words, was culpable negligence on the part of those connected with the vessel."

We have, already, in meeting the case of libelant, fully cited the testimony, and referred to cases to prove that the owners of the vessel were not guilty of culpable negligence, or of any negligence. If we agree with the Court below in its above expression, we claim immunity from liability on another ground. The testimony proves that the disturbance of the hatch covers happened neither through design or through negligence, but as the consequence of an inevitable accident. It was a casualty purely accidental. It was done against the will, intent, and desire of the person doing it. That person—under either version of the testimony—was bent upon the performance of a lawful act. No human prudence, forethought, or sagacity can prevent slipping or stumbling. It was an unavoidable accident. "When we speak of an unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible in

the nature of things for the defendant to have prevented; all that is meant is, that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise."

Dygert v. Bradley, 8 Wend. (N. Y.) 473.

In the nature of things, the fact of the keg being pitched into the hold by either person was a *casus fortuitus*. But even if, by an utmost stretch of legal construction, it should be held negligence, we submit that the claimants are not liable for its consequences, to whichever version of facts, under the conflicting evidence, credit may be given.

Says Shearman and Redfield on Negligence, section 6: "Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires, but it is only the lack of such care or diligence as the law demands, in the particular case, which constitutes culpable negligence, and the law makes no unreasonable demand. It does not require from any man *superhuman wisdom* or foresight. Therefore, no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances," citing

Dygert v. Bradley, 8 Wend. 469.
Harvey v. Dunlop, Hill & D. Supp. 193.

The opinion also announces (p. 165) a rule of law, as follows: "The claimants owed a duty to libelant, as one of the stevedore's gang, to provide reasonable security against danger to life or limb." We do not deny the rule, but we believe that it is applicable only to the case where the claimants have exclusive control, and the acts or omissions of the stevedores are not the direct cause, or do not contribute to the accident.

We believe that this exception is sustained by the cases which are cited in the opinion on page 167, and which we have carefully examined, and believe that none of the cases are based on facts analogous to those of this case, and that none sustains a charge of negligence against the owners of the ship. We take up the cases in the order cited.

In the case of The Bark Kate Camm, 2 Fed. Rep. 241, a structure was erected in the between decks of the ship for the purposes of loading dunnage. It was overloaded, and fell without any apparent cause, other than the excessive weight pressing upon the braces by which it was supported, and there was nothing connected with it to call the libelant's attention to the fact that it was or might be dangerous. So far as the libelant was concerned, it was a trap and hidden danger.

In The Helios, 12 Fed. Rep. 732, the libelant was a stevedore employed in loading the cargo. The chain locker hatch was left open and unprotected. "It was not a hatch for the usual stowage of cargo, such as stevedores must at their peril look out for and are presumed to

know about. It had no reference to the cargo, and the stevedores had no business with it, as the evidence shows. When the first mate told the stevedore the vessel was ready for him to proceed to stow the cargo, that was a virtual warranty against all such traps in the darker parts of the vessel, which could not be, or would not be, perceived in the ordinary course of stowage." It was an evident fact "that this hold was left open and unguarded in a dark place, after the first officer had said the vessel was ready for stowing the cargo."

In The Max Morris, 24 Fed. Rep. 860, it was held that vessels employing stevedores to work upon a ship are bound to provide reasonable safeguards against danger arising from peculiarities in the *construction* of the vessel.

In The Phoenix, 34 Fed. Rep. 760, the libelant was one of a gang of stevedores at work in stowing cotton in the hold of the ship. The sling, containing three bales of cotton, parted, and one of them fell down the hatchway, striking the libelant and inflicting serious injuries upon him. The ship furnished the appliances for loading, among which were the slings. The foreman stevedore testified that he frequently called attention to the unsafe character of the slings. It was held, as a matter of fact, that the sling was an old one, and, it being the duty of the ship to furnish the stevedore with safe appliances, the ship was liable.

In Crawford v. The Wells City, 38 Fed. Rep. 47, the libelant was a grain trimmer, employed by a contractor to

work in trimming the cargo of grain being loaded on board of the ship, and was so engaged when a seaman belonging to the ship placed the hatch cover on. The libelant stood aside while the cover was being put on, but afterward resumed work on the order of the mate of the ship. Two seamen then attempted to spring the hatch cover together, and one cover, which was greasy, slipped and fell upon the libelant and injured him. When hatch covers are placed in position so as to exclude light from those below, the libelant, "in the absence of notice to the contrary, was entitled to assume that the adjustment of the hatch covers had been completed, and especially so when the mate, who directed the placing of the hatch covers, indicated to him it was time for him to resume his work." The Court said, among other things: "The evidence, as I understand it, shows negligence in the performance of the ship's work of putting on the hatch covers. The negligence consisted in attempting to handle the cover by a single man, instead of by two. The cover was greasy and liable to slip, and, in case of any slip, it would be impossible for a single man to hold it, weighing, as it did, some seventy pounds. . . . . The libelant, instead of being warned that the hatch covers were not in place, was, in legal effect, notified by the mate that the covers were in place."

In The Nebo, 40 Fed. Rep. 31, a cross-beam belonging to the ship "Nebo," and supporting a platform made under the orders of the mate, at the request of the stevedore,

to aid in discharging the cargo, broke from being overweighted, seriously injuring one of the men. The captain of the ship knew the beam to be weak or without sufficient support, and claimed to have cautioned the men not to put too much weight on it. Held, the ship was liable; that her officers had no right to thus authorize the use of a defective beam, and should have stopped further loading of cargo on it. The Court said: "If the beam was known to be weak or without sufficient support, neither the mate nor the master had any right to authorize its use for the platform to hold cargo, and, having done so, the ship cannot be exempted from liability simply because they advised the men not to put too much on it, if they did so advise them. The men had no means of knowing or testing its strength, and if the master believed there was too much weight there, it was his business to stop the further loading of it."

In The Terrier, 73 Fed. Rep. 265, a stevedore was working on the hold beneath an open hatch, and while there the servants of the shipowner commenced relaying the floor of between the decks. "In passing the flooring down through the hatchway immediately over the head of the stevedores a plank was allowed to fall, and, striking the libelant, inflicted serious injuries. There was carelessness and negligence both in passing the flooring down through the hatch and allowing the plank to fall. It should have passed through another hatch equally convenient, whereby all danger would have been avoid-

ed. The work was being performed by the crew under the supervision of one of the mates."

In Leathers v. Blessing, 105 U. S. 626, the libelant went on board of the steamboat "Natchez" to see if a consignment of cotton seed which he expected had arrived by that boat. As he was going through a passageway to the officer of the boat, a bale of cotton fell from the upper part of the passageway upon his leg, by which it was injured. The bale of cotton was carelessly and negligently stowed, and was left in such a position that it was liable to fall upon persons going along the passageway to the foot of the stairs of the steamboat, and its position was known to the master of the steamboat. "The libelant not only went on board of the boat for a purpose proper in itself, and so far as he was concerned, but he went substantially on the invitation of those in control of the vessel." Under such circumstances, the relation of the owner of the vessel to the libelant was such as to create a duty on them to see that the libelant was not injured by the negligence of the master.

In The Frank and Willie, 45 Fed. Rep. 494, the mate of a vessel, working with the seamen in discharging a cargo of lumber, continued to unload the cargo in a dangerous manner, after his attention had been called to the danger and complaints had been made, and persistently and obstinately refused to take the usual precautions to prevent the lumber from falling. The cargo subsequently fell and injured a sailor. The vessel was held liable.

In Dickson v. Pluns, 98 Cal. 384, a chisel which fell on the plaintiff, was in the exclusive control of defendants' servant. It was in his hands when it fell. The tool was being managed by the defendant's servant.

McCauley v. Norcross, 155 Mass. 584, was an action of tort brought under a statute of Massachusetts, entitled, "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employes in their service." By the second section of this act, the employer was made liable, "By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence."

Act of 1887, c. 270, sec. 2.

On the trial in the court below, the defendant requested the judge to rule that, upon all the evidence, the plaintiff could not recover. The judge refused so to rule, and the jury having found a verdict for the plaintiff, the defendants alleged exceptions. This was the only exception taken in the case. The Court pointed out several particulars in which the jury might have found that the superintendent was guilty of negligence in exercising superintendence in respect to the beam which fell upon and injured the plaintiff, and said:

"The question is whether the moving of the beam was so likely to occur that it ought to have been provided against by the superintendent."

The jury must have found that the superintendent was,

in some respect, negligent, otherwise they would not have rendered a verdict for the plaintiff; but in what particular they found that he was negligent does not appear. While the Court said, "The fact that the superintendent himself happened to be the person who pushed the beam with his foot is of no importance because that "was not an act of superintendence," still, the jury might not have drawn so nice a legal distinction and might have found—and we think it not a violent presumption that it did so find—that this was an act of negligence, on his part, as superintendent, and based their verdict upon it. But, however this may be, the facts and conditions of this case are very different from the one at bar. In the case cited, the defendants had, by their servant, the superintendent, the exclusive management and control of the beams that fell upon and injured the plaintiff.

In each of these cases the duty and responsibiity for violation thereof rested exclusively with the defendant, and furnish no rule applicable to the facts of the case at bar.

The opinion of the Court announces (p. 168) a further principle, as follows: "It is undoubtedly true that in actions for injury resulting from the negligent acts of others, the burden is on the plaintiff to make out a *prima facie* case of negligence, but it is also true that there is a class of cases where the fact of injury itself, connected with other facts and circumstances, establishes that there was negligence to justify a judgment for damages."

But this, we contend, is an exception to a stringent rule of law, and demands exceptional facts, and we submit, that the facts of this case keep it within the rule, and no-way beyond the operation of it. So unlike are they to those of the cases cited in the opinion on page 169 *et seq.*, to which we now specifically refer this Court.

The case first cited is Scott v. London Dock Co., 3 Hurl. & Colt, 596, 601. In this case is announced a rule which we claim sustains the position of these appellants. The defendant was possessed of a warehouse and of machines for lowering goods therefrom. Certain bags of sugar were being lowered to the ground, along which the plaintiff was lawfuly passing. This work was done so negligently by the servants of the defendant that the bags fell upon and injured the plaintiff. The Court of Exchequer held that there was no sufficient evidence of negligence on the part of the defendant to justify its leaving the case to the jury, and directed a verdict for the defendant. Thereafter, a rule nisi for a new trial was obtained on the ground that there was evidence for the jury of negligence of defendant's servants. Subsequently, this rule was made absolute, in order that the case might be taken to a court of error. In the Exchequer Chamber the judgment of the Court of Exchequer, making the rule absolute, was affirmed—Erle, C. J., and Mellor, J., dissenting—and a new trial ordered. It was in this case that Erle, C. J., said: "The majority of the court have come to the following conclusions: There must be reasonable evi-

dence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In Byrne v. Boadle, 2 H. & C. 721, the plaintiff was walking in a public street past the defendant's shop, when a barrel of flour fell from a window of the shop and injured him. It was held sufficient prima facie evidence of negligence for the jury to cast on the defendant the onus of proof that the accident was not caused by his negligence. In this case the barrel was in the exclusive custody of the defendant, who occupied the premises, and as the barrel could not roll out of the warehouse without some negligence, the Court, in the absence of all proof as to what caused it to roll out, applied the doctrine of *res ipsa loquitur*.

In White v. France, L. R. 2 C. P. Div. 308, cited in the opinion on page 170, the plaintiff was on defendant's premises in relation to a matter of business that concerned the defendant, and having been referred to defendant's foreman, while approaching him, a bale of goods which had been negligently left by defendant's servants nicely balanced at the edge of a warehouse trapdoor, from where such bales were lowered, suddenly fell upon and injured him. The Court held that the bale which caused

the injury was placed in such a position as to be dangerous, and yet not to give any warning of danger to anyone passing by the spot where it fell, so it was a trap or concealed source of mischief.

In Kearney v. London etc. Ry. Co., L. R. 5 Q. B. 411, the plaintiff was passing along a highway under a railway bridge of the defendants. A brick fell from the pilaster of a wall on which a girder of the bridge rested, and injured the plaintiff. A train had passed just previously. Held, by Cockburn, C. J., and Lushington, J.—Harmon, J., dissenting—that so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence of the defendants.

On appeal to the Exchequer Chamber, L. R. 6 Q. B. 760, the judgment in favor of the plaintiff was affirmed. Kelly, C. B., said: "It appears, without contradiction, that the brick fell out of the pier of the bridge without any assignable cause, except the slight vibration caused by the passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose, for otherwise so slight a vibration could not have struck it out of its place. . . . . If there were necessity for further evidence, the case is made still stronger by the evidence of the plaintiff, which is uncontradicted on the part of the defendants, that after the accident, on fitting the brick to its place, several other bricks were found to have fallen out."

In Howser v. Cumberland & B. R. Co., 80 Md. 146, 30 Atl. 906, the plaintiff was walking along a pathway out-

side of the railroad company's right of way. Some ties which were loaded on a "gondolier car" slipped or fell from the car on which they were loaded and injured the plaintiff. It was held that this fact was, under the doctrine of *res ipsa loquitur*, *prima facie* evidence of negligence on the part of the railway company—JJ. McSherry and Fowler dissenting.

Pastine v. Adams, 49 Cal. 87, announces a principle applicable only to a case where the owners of a ship, being in control, should be held liable to a condition of things for which it was wholly responsible. It does not cover a case where the owners were simply the owners, and did not create and maintain the condition of things by reason of which the accident occurred.

: Finally, if the testimony of two eyewitnesses who were actually in the most favorable position to know be accepted, it was one of the stevedore's men who stepped upon the hatch covers and caused the keg to fall. Hence, if such act was negligence, it was not negligence on the part of the ship, and the ship is not responsible for its consequences.

If, on the other hand, the theory attempted to be proved by libelant be credited, although, as we think we have shown, it has no intrinsic merit, it was the second mate or one of the ship's boys who disturbed the equilibrium of the hatch covers and thereby pitched the keg into the hold, still, we claim that, even under this assumption of the facts, libelant has failed to establish any

liability on the part of the claimants arising from alleged want of care.

If the libelant has any cause of action for damages, it is against the stevedore who employed him, and not against the claimants, who employed the stevedore under a contract.

It is to be continuously borne in mind that the determination hereof depends upon a question of the true state of the facts concurrent on the ship. There are versions of two sets of witnesses. The Court will notice that the witnesses upon whom the libelant must chiefly rely were Davidson, Fitzgerald, Gray, King, Nelson, P. O'Donnell, and Ryan. Of these there was no one who did not state either something palpably inconsistent with something that some other of his witnesses had said, or else something so improbable or impossible, and uncorroborated by any other, as to leave an impression of the untrustworthiness of the witness.

The witnesses upon whom claimants rely are the second and third mates. We respectively submit that there can hardly be any doubt, under these circumstances, that the testimony of the two claimants' witnesses, who corroborate each other in every particular, is to be preferred to that of the witnesses of libelant, who, in material matters, corroborate each other in scarcely any particular. This seems especially significant from the fact that we fail to discover that either of the mates told anything evasive, prevaricatory, or suggestive of anything but what was probable, reasonable and true.

Notwithstanding the necessity of a careful and critical examination of the testimony and the authorities, in order to illustrate the contention of the claimants, still, we must apologize for the length of the foregoing discussion; yet, if this Court shall, in its investigation of the cause, derive from it the slightest aid, then its purposes will have been accomplished and in this hope it is respectfully submitted.

ANDROS & FRANK,:
Advocates for Appellants.

No. 385.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ship "Joseph B. Thomas," Samuel Watts *et al.*, Claimants, Appellants,

vs.

Jens P. Jensen, Appellee.

BRIEF FOR APPELLEE.

FRANK P. PRICHARD,
For Appellee.

Allen, Lane & Scott, Prs., Phila.

UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE NINTH CIRCUIT.

Ship "Joseph B. Thomas," Samuel Watts et al., *Claimants, Appellants,*

vs.

Jens P. Jensen, Appellee.

IN ADMIRALTY.

BRIEF FOR APPELLEE.

Most of the elaborate brief on behalf of the appellants is devoted to a discussion of disputed questions of fact. The decision of the case, however, did not turn in the court below, and does not depend in this court, upon the settlement of any dispute as to facts, but is governed by the application of well-settled legal principles to certain facts which are not in dispute. Those facts are as follows :—

1. While the ship "Joseph B. Thomas" was lying in the port of Philadelphia and was being loaded by a stevedore, the libellant, who was in the employ of the stevedore and was working in the hold of the ship, was struck on the head by a keg belonging to the ship and which fell from the main deck through an open hatch.

2. The accident happened in the afternoon of Apirl 11th, 1892. The three hatch covers of the main deck had been taken off in the morning and piled one on top of the other on the main deck immediately adjacent to the forward hatch, the top cover being about flush with the top of the hatch combing. These covers were slightly curved, and each had on top four ring bolts by which to lift it. The keg belonged to the ship. It had been painted by some one connected with the ship, and some time in the forenoon had been set on top of these hatch covers to dry. Some one stepped on or jarred the hatch covers, and this caused the keg to roll off into the open hatch, falling thirty feet and striking libellant, who was at work underneath.

3. The libellant's skull was fractured, resulting in paralysis and permanent disability. At the time of the accident he was a strong, muscular man, twenty-nine years of age, and in good health.

A brief comparison of the account of the accident given by libellant's witnesses with that given by claimants' witnesses will show that they agree with each other as to the above facts.

The best account given in libellant's proofs was that given by John F. Fitzgerald, an entirely disinterested witness, in the employ of the Pennsylvania Railroad and not connected with either party. His testimony (Record, page 34) was as follows:—

Q. Please state in your own way what you saw of this accident?

A. The mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. It wasn't a barrel; it was a keg.

Q. Where was the keg standing at the time of the accident?

A. Right on the corner of the hatch. The hatches were taken off, and then put one on top of the other, and the keg set over, and when you tread on that corner of the hatch that turned the keg over, and it rolled right down the hatch before anybody could get hold of it.

Q. Who was the young man that trod on the hatch?

A. A young man belonging to the ship.

The account given for claimants by Edward Peterson, the second mate (Record, page 112), was as follows:—

Q. Go on; state how it happened?

A. There was a little keg standing on one corner of the hatch cover—on the port corner of the hatch cover—and one of the men happened to touch the top hatch cover on the starboard side, and through that it started the keg off the hatch cover and the keg went down through the hatch and struck the man.

Q. Who was the man that trod on the hatch cover?

A. One of the stevedore's men. Which one it was I cannot say.

* * * * * *

Q. What was the stevedore's man doing when he trod upon the hatch cover?

A. I don't exactly know what he was doing. He just happened to come along and touch the hatch cover. Either he was going down in the hatch, or what he was going to do, I don't know. I know he just happened to touch the hatch cover the least mite.

As to the ownership of the keg the testimony was in accord.

Patrick O'Donnell, libellant's witness, testified (Record, page 47):—

"A. It was a keg about the size of a vinegar barrel "or cider barrel. They generally use them for a "water cask in the forecastle. I should judge about "two feet high.

"Q. Did it belong to the stevedore's men?

"A. No, sir; it belonged to the vessel, I suppose. "It didn't belong to the stevedore."

Edward Peterson, claimants' witness, testified (Record, page 122):—

"Q. You say it was a pickle keg?

"A. It had been a pickle keg, but used at the "present time for fresh water to drink in the room.

"Q. It belonged to the vessel?

"A. Yes, sir."

As to the construction of the hatch covers and the fact that they were piled adjacent to the hatch with their tops about on a level with the hatch combing, there was also an agreement of testimony.

JOHN F. FITZGERALD, libellant's witness, testified (Record, page 39):—

"A. There was a hole, and the hatches were taken "off and set forward.

"Q. Alongside of the hatch?

"A. Yes, sir.

"Q. And the three hatch coverings, therefore, would "come up a little higher than the combings?

"A. They would come about even."

And JOHN BROWN, another of libellant's witnesses, testified (Record, page 72):—

"Q. When one hatch covering is put on top another "one, the top one rests upon the ring bolts?

"A. Yes, sir."

EDWARD PETERSON, the witness called for claimants, testified (Record, page 115):—

"Q. How many hatch covers were there?

"A. Three.

"Q. Were they crowning at all?

"A. Yes, sir; a little crown to the hatch."

(Record, page 116.)

"Q. On which side of the hatch, on the main deck, "were these hatch covers piled, forward or aft?

"A. On the forward.

"Q. How near to the hatch combing?

"A. As close as they could lay; as close as they "could pile them alongside of the hatch combing."

(Record, page 117.)

"Q. How high was the combing to that hatch?

"A. About eighteen inches, I guess; no, not so "much as eighteen. I should say twelve inches. On "the forward part the combing is not so high on "account of there being some thick planks, thicker "than the deck * * *"

(Record, page 118.)

"Q. How is that hatch cover divided; into how "many pieces?

"A. Three parts.

"Q. How high are those parts each? How thick?

"A. Each is about four inches.

"Q. Four inches high?

"A. Yes, sir; four inches."

The testimony of the witnesses on both sides was also in accord as to the length of time during which the keg had been allowed to stand on this pile of hatch covers adjacent to the opening of the hatch.

Chris Nelson, a witness for libellant (Record, page 62), testified:—

"Q. Did you see that keg before?

"A. Yes, sir; I saw it that forenoon. A young "man was sitting painting it, and set it there to dry "on the hatches.

(Record, page 65.)

"Q. What time of day was it that you saw this "barrel setting on the hatch coverings to dry?

"A. Some time in the forenoon.

"Q. What time of day was it that the accident "happened?

"A. In the afternoon.

"Q. About what time, if you recollect?

"A. Between two and four o'clock."

Edward Peterson, witness for the claimant (Record, page 122), testified :—

"Q. How long before the keg fell did you see it "there?

"A. I couldn't say exactly. It is so long since now, "and I did not carry it in my memory. * * *

"Q. Did it have its cover off?

"A. Yes, sir; no cover on.

"Q. One of its heads off?

"A. Yes, sir; one of the heads was off. The hoops "had been painted."

It will thus be seen that there is practically no dispute that the libellant while in the employ of a stevedore, and properly working underneath the forward hatch, which was open, was injured by the fall of a keg which had been painted and left to dry on top of some hatch covers piled adjacent to the open hatch on an upper deck; and that the cause of the fall of the keg was the fact that some one trod on or jarred the hatch covers, whereupon the keg, being empty, and not secured in any way, rolled down the open hatch.

Upon these undisputed facts the law is clear.

There was a duty on the part of the ship to protect libellant while at work.

In the case of—

Leathers *vs.* Blessing, 105 U. S., 626,

a person who went on board of a vessel for lawful business was injured by the fall of a cotton bale. The court (Blatchford, J., delivering the opinion) said:—

"This makes the case one of invitation to the li-
"bellant to go on board in the transaction of busi-
"ness with the master and officers of the vessel, rec-
"ognized by them as proper business to be transacted
"by him with them on board of the vessel at the
"time and place in question. Under such circum-
"stances, the relation of the master, and of his co-
"owner through him, to the libellant was such as to
"create a duty on them to see that the libellant was
"not injured by the negligence of the master."

In the case of—

Gerrity *vs.* "The Kate Cann," 2 Fed. Rep., 241,

a stevedore was injured by the fall of dunnage and plank upon him. The court (Benedict, J.) said:—

"There was a relation between the shipowner and
"the libellant arising, not out of the mere presence
"of the libellant on board the ship, but out of the
"service he was then engaged in performing, the
"necessity of that service to the shipowner, and the
"circumstances of the libellant's employment to per-
"form that service. The libellant had, therefore, a
"right to be where he was; and it follows that there
"was a duty on the part of the owner to see to it

"that the dunnage and plank stowed above him were "so secured as to prevent its falling upon him of its "own weight."

This case was affirmed on appeal. See—

"The Kate Cann," 8 Fed. Rep., 719.

In the case of—

"The Phœnix," 34 Fed. Rep., 760,

a stevedore was injured by the fall of cotton through a defective sling furnished by the ship. The court said:—

"When a stevedore has full charge of the loading "or unloading of a vessel, and one of his gang suffers "injury by reason of a defective tackle furnished by "the vessel, she is responsible if there be absence of "due care upon the part of her master in furnish- "ing the tackle, or in maintaining it in a safe con- "dition; that is to say, if he knew, or if the circum- "stances were such as to put him on the inquiry so "that he could know, that the tackle was not safe."

In the case of—

Crawford *vs.* "The Wells City," 38 Fed. Rep., 47,

a stevedore was injured by the fall of hatch covers upon him. The court (Benedict, J.) said:—

"Several points are made on the part of the de- "fense. One is that the libellant was at the time of "the accident a servant of the claimant, engaged in a "common employment with the sailors who under- "took to place the cover in position, and therefore

"cannot recover for negligence of a fellow servant. "Upon this point my opinion is that the relation of "fellow servant did not exist between the libellant "and the mate who directed the placing of the covers, "or between the libellant and the seaman who were "engaged in handling the covers at the time the cover "fell."

In the case of—

The "Frank and Willie," 45 Fed. Rep., 494, a seaman was injured by the fall of shaky tiers of lumber. The court (Brown, J.) said:—

"The principle involved, viz., the duty to provide "reasonable security against danger to life and limb, "by at least the usual methods, when these dangers "are brought home to the knowledge of the proper "officers, is manifestly a general one. It attends the "seaman wherever he is required to go on shipboard "in the performance of his duties, and applies as "much to a dangerous condition of the cargo as to "defective rigging or a rotten spar. In the case of "the 'Kate Cann,' 2 Fed. Rep., 241–245, the bark "was held by Benedict, J., liable to an injured steve- "dore, because the dunnage and plank where he was "required to work in the ship's hold had not been "properly secured, the dangerous situation being held "a violation of a duty that the ship and her owners "owed to the workmen. The same principle has been "repeatedly applied in this court in favor of steve- "dores or their employees on board. 'The Helios.' "12 Fed. Rep., 732; 'The Max Morris,' 24 Fed.

"Rep., 860; 'The Guillermo,' 26 Fed. Rep., 921; "'The Nebro,' 40 Fed. Rep., 31."

In the case of—

"The Terrier," 73 Fed. Rep., 265,

a stevedore was injured by the fall of a plank which slipped out of the hands of one of the crew while relaying an upper deck. The court (Butler, J.) said:—

"There is no room for serious controversy about "the facts involved. While the libellant, with other "stevedores, was engaged in the vessel's hold, unload- "ing cargo, her agents and servants commenced relay- "ing the floor of the between deck. This floor had "been taken up and stored above for convenience in "placing cargo. In passing the flooring down through "a hatch immediately over the heads of the steve- "dores a plank was allowed to fall, and, striking the "libellant, inflicted serious injury. There was care- "lessness, both in passing the flooring down through "this hatch and in allowing the plank to fall. It "should have been passed through another hatch, "equally convenient, whereby all danger would have "been avoided. The work was being performed by "the crew under the supervision of one of the mates. "The evidence does not leave these facts in doubt.

"Is the ship responsible for the libellant's injury? "This is the only question raised. In my judgment "she is. First, because she inflicted the injury. This "flooring was as much a part of her as was any other "part of the structure; that it was out of place at the

"time is not important. As is said in the 'Kate Cann,' "8 Fed., 719 (under similar circumstances), 'in legal "'effect the blow inflicted was inflicted by the ship.' "And second, because it was her duty to see that the "place where the stevedores worked was safe, while "they were upon her. Cannon *vs.* 'The Protos,' 48 "Fed., 919, and Records of Dist. Ct., E. D. Pa., No. 8 "of 1889; 'The Kate Cann,' 2 Fed., 243, 8 Fed., 719; "'The Frank & Willy,' 45 Fed., 494; 'The Wells "'City,' 38 Fed., 48; 'The Carolina,' 30 Fed., 200; "'The Helios,' 12 Fed., 732; Sherlock *vs.* Alling, 93 "U. S., 108."

The fact of the fall of the ship's keg from the main deck through the hatch upon the libellant below raises a presumption of negligence on the part of the ship.

It is, of course, not contended that the mere happening of an accident raises a presumption of negligence, but when an article belonging to and under the control of defendants falls upon the plaintiff, there is a presumption of negligence which the defendants must rebut.

In the case of—

Byrne *vs.* Boadle, 2 Hurl. & Colt., 721,

a barrel of flour fell from defendant's shop upon a passerby and injured him. It was held that there was a presumption of negligence, Pollock, C. B., saying:—

"A barrel could not roll out of a warehouse with-"out some negligence, and to say that a plaintiff who

"is injured by it must call witnesses from the ware-
"house to prove negligence seems to me preposterous.
"So in the building or repairing a house, or putting
"pots on the chimneys, if a person in passing along
"the road is injured by something falling upon him,
"I think the accident alone would be *prima facie* evi-
"dence of negligence. Or if an article calculated to
"cause damage is put in a wrong place and does
"mischief, I think that those whose duty it was to
"put it in the right place are *prima facie* responsi-
"ble, and if there is any state of facts to rebut the
"presumption of negligence, they must prove them."

In the similar case of—

Scott *vs.* The London, &c, Docks Co., 3 Hurl. & Colt., 596,

Erle, C. J., said:—

"There must be reasonable evidence of negligence.
"But where the thing is shown to be under the
"management of the defendant or his servants, and
"the accident is such as in the ordinary course of
"things does not happen if those who have the
"management use proper care, it affords reasonable
"evidence, in the absence of explanation by the de-
"fendants, that the accident arose from want of care."

This language is cited and followed in—

Dixon *vs.* Plums, 98 Cal., 384.

In that case respondent, while walking upon the sidewalk of a street, was struck by a chisel which fell from a scaffolding plank on which one of the

defendant's employees was working. It was held that this established a *prima facie* case of negligence on the part of defendant.

In the case of—

Sheridan *vs.* Foley, 33 Atl. Rep., 484.

one engaged in laying a sewer in a building in course of erection was injured by a brick falling from above, and it was held that there was a *prima facie* case of negligence on the part of the contractor, the court saying :—

"The bricks were in the custody of the defendant's "servants at the time when this one fell, and it was "their duty to so handle them as not to endanger "others who were engaged in other work upon the "same premises. This brick could not have fallen of "itself, and the fact that it fell, in the absence of ex- "planation by the defendant, raises a presumption of "negligence. If there are any facts inconsistent with "negligence, it is for the defendant to prove them."

The placing of the empty keg in such a position that an accidental jar or disturbance would precipitate it upon persons lawfully working below was in itself negligence, and the fact that the jar or disturbance was caused by the intervening agency of a third person would not relieve the ship.

According to libellant's testimony, the hatch covers were properly piled, but from the nature of their construction a person treading on them would necessarily

destroy the equilibrium of a keg set on top of them. The testimony of respondents, on the other hand, was that the hatch covers were manifestly piled so improperly that a slight jar would destroy the equilibrium of the keg, Mr. Anderson, the mate, testifying that the man "just happened to touch the hatch "cover the least mite." On either theory the keg was placed by a ship's employee in a place where if any one trod on or jarred the hatch covers it would probably roll down the hatch. This was the real negligence in the case, and it makes no difference who trod on or jarred the hatch covers. An empty keg is an object whose equilibrium is easily disturbed. It should not have been set to dry in the neighborhood of open hatches, but if it were so set it might at least have been placed on the deck where the hatch combings would have afforded some guard to prevent it from rolling down the hatch. Instead of that, it was set substantially on a level with the hatch combings on a necessarily insecure foundation and in close proximity to a hatch underneath which the stevedores were working. It was set in that position by a ship's employee, and seen in that position by the ship's officer, who did not remove it. Clearly, this was negligence.

In the case of—

White *vs.* France, L. R., 2 Com. Pleas, 308,

a bale of goods was left nicely balanced on the edge of a trap door and fell upon a passerby. It was held that the occupier of the premises was negligent.

In the case of—

Pastene *vs.* Adams, 49 Cal., 87,

defendants were lumber merchants, and had a pile of lumber so insecurely piled that when a third person driving in from the street caught his wheel in the end of one of the timbers, the whole pile fell on a visitor. The court held that the defendant's were liable, and that their negligence was the proximate cause of the injury.

In the case of—

McCauley *vs.* Norcross, 155 Mass., 584 (30 N. E. Rep., 464), defendants were erecting a building, and some iron beams were so placed near an open hole in the floor that when the superintendent in passing pushed one of the beams with his foot, it fell on an employee below. It was held that defendants were liable, the court (Allen, J.) saying:—

"The fact that the superintendent himself happened "to be the person who pushed the beam with his foot "is of no importance, because that was not an act of "superintendence. If the beams were so left that one "of them would be liable as a natural consequence, "from such intervening cause or agency, to be so "moved that it might fall through the floor, the fact "that an intervening act or agency occurred which "directly produced the injurious result would not "necessarily exonerate the defendants from responsi- "bility. Superintendence is necessary in order to "guard against injuries from such intervening and "inadvertent acts of careless persons as are likely to

"happen, and ought to be guarded against. The "question is whether the moving of a beam was so "likely to occur that it ought to have been provided "against by the superintendent. It might be found "that the beams were negligently left near the hole in "the floor, where they were likely or liable to be "toppled over, so that one of them might fall through "the hole and thus injure some one below, and that "this was the proximate cause of the plaintiff's injury, "although some careless person came along and top- "pled them over."

In the case of

Johnson *vs.* 1st Nat. Bank Ashland, 48 N. W. Rep., 712,

the defendant allowed snow and *debris* to be thrown and remain upon the roof of a shed under which its employees were working. It was held liable, although the negligent act of a co-employee also contributed to the injury, the court (Orton, J.) saying:—

"It is elementary law that the master must furnish "a safe place in which he requires his servant to "work, and furnish him with safe appliances. The de- "fendant is liable to the plaintiff for an injury caused "by its agents permitting such a weight to be thrown "and remain on the roof of the shed in which the "plaintiff was required to do his work as to render his "work unnecessarily hazardous. Bessex *vs.* Railroad "Co., 45 Wis., 477. The general duty of a master to "exercise care to prevent the exposure of his servant "to unnecessary and unreasonable risk requires him,

"among other things, to use diligence in seeing that "the place where he works is safe: Cook *vs.* Railroad "Co. (Minn.), 24 N. W. Rep., 311. McDonald *vs.* Rail- "road Co. (Minn.), 43 N. W. Rep., 380; 2 Thomp. "Neg., 772. The act of the defendant in ordering the "plaintiff to work in a place that was not safe, and "which caused him injury, makes the defendant lia- "ble, if the defendant knew or ought to have known "that such place was unsafe, although the negligence "of a fellow servant may have contributed to the "injury, if he was himself free from fault. McMahon "*vs.* Henning, 3 Fed. Rep., 353; Heckman *vs.* Mackey, "35 Fed. Rep., 353. If the injury was caused by the "negligence of the defendant corporation in requiring "the plaintiff to work in a dangerous place, the neg- "ligence of a co-employee will not defeat a recovery. "Stetler *vs.* Railroad Co., 46 Wis., 497; 1 N. W. Rep., "112; Paulmier *vs.* Railroad Co., 34 N. J. Law, 151. "In view of the authorities in application to the facts, "the liability of the defendant in this case seems to "have been established. The superintendent, Scott, "and the foreman, Huston, were responsible between "them for the falling of the shed. They probably "ordered the rubbish and the snow to be thrown on "the shed, and at least knew of it. They ordered the "snow to be thrown from the roof of the bank build- "ing upon the shed to keep it from breaking down "the roof of that building, but were careless and neg- "ligent as to its greater liability to break down the "roof of the shed. They made a 'dead fall' and re- "quired the plaintiff to work under it."

These cases only affirm the general rule, which is well stated in—

Clerk & Lindsell on Law of Torts, pages 370–376, as follows:—

"So the owner of premises owes a duty towards "those whom he invites there to take care to see "that the premises are in a fit state of repair, and "if owing to his omission to exercise care in this "respect, bricks or tiles or other portions of the "structure of a building fall upon them, he is lia- "ble; similarly will he be liable if he negligently "leaves some chattel, such as a bale of goods, deli- "cately poised in such a position as to be likely to "fall and injure them.

* * * * * *

"To establish the defendant's liability, his negli- "gence need not necessarily have been the immedi- "ate cause of the injury; provided it be a substan- "tial part of the cause, he will be none the less "liable because the injury may have been contribu- "ted to by the intervening negligence of a third "person. Abbott *vs.* Macfie, 2 H. & C., 744; Clark "*vs.* Chambers, 3 Q. B. D., 327."

Even if the negligence of a co-employee contributed to the injury, this would not exonerate the ship.

"The Phœnix," 34 Fed. Rep., 760.

It is respectfully submitted that it is not necessary to enter into the question as to the veracity of witnesses in this case, since under the authorities cited, the ship is clearly responsible upon the facts which

are agreed to by all the witnesses, and this is the conclusion at which the learned judge of the court below finally arrived in his opinion.

If, however, this court should think it material to take up the other facts in the case which are in dispute, to a discussion of which most of the brief of the appellant's counsel is devoted, then it is submitted that the evidence amply justified the finding of the court below. A few words will suffice to state the position of appellant on these questions.

It will be observed that the disputed questions of fact were only two, viz. :—

First.—Was it a stevedore or a sailor who trod upon, or jarred, the hatch covers?

Second.—Were the hatch covers improperly piled?

With regard to the second of these questions there really was no serious conflict, nor was there any evidence on which the court below could have found that the covers were improperly piled. All the libellant's witnesses who testified on the subject said that the hatch covers were piled one on top of the other, in the usual way, and that there was no more secure way to pile them. The claimants' counsel has inadvertently fallen into error, on page 19 of his brief, in stating that counsel for libellant objected to the question as to whether the hatch covers were properly or improperly piled. An inspection of the record on page 56, to which he refers, and also on the preceding page, 55, will show that the objection came from

the counsel for the claimants. It was, however, directly testified that they were piled in the usual manner, and that there was no other way of piling them which would have rendered them any safer. (Record, page 56.) On the other hand, there was no testimony in the part of the claimants which would have justified a finding that they were improperly piled. It is true that the mate, Edward Peterson, testified (Record, page 115):—

"Q. What was the reason that this hatch cover "tipped when the stevedore's men touched it or "stepped upon it?

"A. It was not laid down as it ought to be. It "was not laid down solid. If the hatch coverings "were put down as they ought to be, one on top of "the other, there would not be any trouble attached "to it; but they just put them down any way at "all, as they were always in a hurry."

It will be observed that this witness points out no way by which three covers having curved tops and ring bolts in each corner of the top can be laid down on top of each other so as to make them solid. The only light he gives as to the method is that they should put one on top of the other, and yet this description of the proper method of piling is the one which counsel for appellants ridicules on page 19 of his brief when given by the witnesses for the libellant. The learned judge who delivered the opinion was therefore fully justified in dismissing this part of the case with the statement that so far

as the evidence disclosed, the hatch covers were piled in the usual and proper manner.

It may be added that the testimony of the claimants on this point proves too much for their case. The mate says (Record, page 119):—

"Q. Before this accident, that day, had you noticed that these covers were not properly laid on the deck—this particular day and these particular covers?

"A. Yes, sir; I did. I see the way they were laying, but it was so usual to see them that way nearly all the time. When I had time to do it myself I altered them.

"Q. Why did you not alter them that day?

"A. I had not time to do it, and it was not my place to do it."

It is not pretended that the alleged improper piling occasioned any danger that the hatch covers themselves would fall into the hatch. Nor was it reasonably to be anticipated that any one would select such an insecure place as the top of three curved hatch covers, each resting on ring bolts, and all adjacent to an open hatch, as a place to dry an empty keg. The mate's testimony, however, establishes the fact that the alleged insecurity of the piling, if it existed, was apparent to the eye, and thus fastens negligence conclusively both on the ship's employee who set the keg on this insecure foundation adjacent to the hatch, and on the mate himself, who said that the covers were insecure, and who saw the keg on top of them but who did not remove it.

The other question of fact, namely, whether a sailor or a stevedore trod on the hatch covers, was one on which, as the learned judge states, the testimony is irreconcilably conflicting. It is not proposed in this brief to follow the able counsel for the claimants in his labored effort to prove that the conclusion of the learned judge below as to this fact was wrong. It is submitted that irrespective of the weight which the court of appeal would give to a decision of the court below on a question of fact made after a very thorough and careful review of conflicting evidence, an independent examination of the evidence by the court of appeal will necessarily lead to exactly the same result. The respondent's testimony consisted entirely of interested witnesses. It was contradicted by the testimony of the stevedores (every stevedore that worked on the ship being called). If the stevedores are also classed as interested witnesses and their testimony is set up against the claimants' witnesses, the case would then rest upon the testimony of the two disinterested witnesses, viz., Fitzgerald (Record, page 34) and Grey (Record, page 98). These parties were entirely disinterested. They attended on subpœna (Record, page 43), and neither their character nor their motives were impeached. Their testimony is directly in conflict with respondents' witnesses, and corroborates the story told by the libellant's witnesses. The criticisms which counsel for appellant makes upon the testimony can best be answered by simply referring to the evidence itself. If that is read, it will appear that these criticisms are unsound. Counsel for appellee

appeals with great confidence to the testimony, and believes that on this question of disputed fact a careful reading of the testimony is more convincing than any brief that can be written.

What has been said with regard to the disputed questions of fact has been said simply because they have been discussed, not because they are believed to be material to the decision. The position of the appellee is that it was negligence on the part of the employees of the ship to place an empty keg upon a pile of covers, the top of which was flush with and adjacent to an open hatchway, and to allow the keg to remain in that position where a jar or movement of the covers would precipitate it into the hole below. If this be correct, it matters not whether the person who trod on or touched the covers was a sailor or a stevedore, or whether the covers were properly or improperly piled.

It is submitted, therefore, that the judgment of the court below should be affirmed.

FRANK P. PRICHARD,
For Appellee.

No. 386.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

Northern Pacific Railroad Company,
Plaintiff in Error,

vs.

Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert,
Defendants in Error.

TRANSCRIPT OF RECORD.

Error to the United States Circuit Court, for the District of Montana.

INDEX.

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Be it remembered, that on the 8th day of May, 1891, the plaintiff herein filed its complaint, which is in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Complaint.

For cause of action against said defendants plaintiff complains and alleges:

I. That is it a corporation, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern

route," and those acts and joint resolutions supplementary thereto and amendatory thereof.

II. That it is and was, at all the times hereinafter mentioned, the owner of, and entitled to the possession of the south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana.

III. That on the day of 1890, while the plaintiff was seized in fee simple of said land, the said defendants, without right or title, entered into possession thereof, against the will and without the consent of the plaintiff and ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff.

IV. That said land is of the value of over ten thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of possession of said land, and for its costs and disbursements herein.

CULLEN, SANDERS AND SHELTON
F. M. DUDLEY,

Attys. for plaintiff.

State of Montana,
County of Lewis and Clarke, } ss

F. M. Dudley, being duly sworn says: That he is an officer of the above-named plaintiff, to-wit its general land attorney; that he has read the foregoing complaint

and knows the contents thereof, and that the same is true according to his best knowledge, information and belief.

F. M. DUDLEY,

Subscribed and sworn to before me this 6th day of May, 1891.

[Seal] CHAS. H. COOPER,

Notary Public.

[Endorsed]: Title of court and cause. Complaint. Filed May 8, 1891. Geo. W. Sproule, Clerk.

And on the said 8th day of May, 1891, a summons was duly issued herein which said summons as duly returned is in the words and figures as follows, to-wit:

UNITE DSTATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT

Defendants.

Summons.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clarke.

The President of the United States of America, Greeting, to Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said Court, in the city of Helena, and county of Lewis and Clarke, within 20 days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover from you said defendants the possession of that certain piece, parcel or tract of land described as follows: the south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana; which you said defendants on the ..... day of ..... 1890, while plaintiff was seized in fee simple, ousted and ejected plaintiff therefrom and now unlawfully withhold possession thereof from plaintiff, and for costs and disbursements herein all of which is more fully set out in the original complaint on file herein to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your

default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the 115.

[Seal] GEORGE W. SPROULE,
Clerk.

By ————————,
Deputy Clerk.

United States Marshal's office,
District of Montana.

I hereby certify, that I received the within writ on the 8th day of May, 1891 and personally served the same on the dates named days of May, 1891, by delivering to, and leaving with Maria Amacker and John J. Amacker (16), Frank H. Pings (26), A. J. Steele, W. H. Little, Geo. S. Howell, Geo. Dibert, J. Jordan, Geo. Gotthardt, John Blank, (12th). Said defendant named therein personally, at the county of Lewis and Clarke in said district, a certified copy thereof, together with a copy of the complaint, certified to by clerk of said Circuit Court attached thereto.

W. F. FURAY,
U. S. Marshal.
By Geo. Leekley,
Deputy.

Helena, May, 27th, 189 .

[Endorsed]: Filed June 6th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit on the 20th day of June, 1891, the answer of certain defendants was filed herein, which said answer is in the words and figures as follows ,to-wit:

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana:

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Answer of Defendants Geo. S. Howell, et al.

The defendants George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, who appear by Thos. C. Bach their attorney, for answer to the complaint herein—

1st. Deny that the plaintiff is or ever was the owner of or entitled to the possession of the south half of the northwest quarter of section 17, township 10 north, of range 3 west, of the principal meridian of Montana, or any part thereof.

2nd. Denies that defendants or any of them ever or at all ousted or ejected plaintiff from said premises or any thereof, or that they or any of them unlawfully withheld the possession thereof or any thereof from such plaintiff.

Wherefore defendants pray judgment against the plaintiff, that the complaint of plaintiff be dismissed, and that they recover their costs in this case expended.

THOS. C. BACH,
Attorney for defendants named.

State of Montana,
County of Lewis and Clarke. } ss.

Walter H. Little, being duly sworn, says that he is one of the defendants answering herein, and that he and they are united in their interests and pleading in this case, and that he is acquainted with the facts of this case; that he has read the foregoing pleading and knows the contents thereof, and that the facts therein stated are true to his own knowledge, except as to those matters which are therein stated on his information and belief, and as those matters that he believes it to be true.

WALTER H. LITTLE,

Subscribed and sworn to before me this 20th day of June, 1891.

THOS. C. BACH,
Notary Public in and for Lewis and Clarke county, State of Montana.

I do hereby certify that in my opinion the foregoing answer is well founded in law.

THOS. C. BACH,
Attorney for defendants.

Service of the above answer this 20th day of June, 1891 admitted.

CULLEN, SANDERS and SHELTON,
Attys. for plff.

[Endorsed]: Title of Court and Cause. Answer. Filed June 20, 1891, Geo. W. Sproule, clerk. By W. J. Kendy, Deputy Clerk.

And thereafter, to-wit on the 18th day of March, 1892, the answer of defendants Maria Amacker and John Amacker, her husband was filed herein which said answer is in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Answer of Defendants Maria and J. J. Amacker.

Separate answer of Maria Amacker and John J. Amacker her husband.

And now comes Maria Amacker and John J. Amacker, two of the defendants above named, and for their separate answer to the complaint of the plaintiff.

First. Deny that the said plaintiff is, or was at all the times, or any of the time, or ever the owner of or entitled to the possession of the south half of the northwest quarter of section number seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or that plaintiff is, or ever was the owner of or entitled to the possession of any part or portion of said premises.

Second. Deny that the plaintiff was at the time mentioned in said complaint seized in fee simple of said land or had any interest therein, and deny that these defendants or either of them without right or title entered into the possession thereof, and deny that these defendants, or either of them, ousted or ejected the plaintiff from said premises, or any part thereof, and deny that these defendants, or either of them, now unlawfully withhold possession of said premises from the plaintiff.

Wherefore, having fully answered said complaint, these defendants pray to be discharged with their costs in this behalf expended.

MASSENA BULLARD,
Attorney for answering defendants.

State of Montana,)
County of Lewis and Clarke.) ss.

Maria Amacker being duly sworn says: That she is one of the answering defendants named in the foregoing answer, and acquainted with the facts therein stated; that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge except as to those matters which are therein stated upon her information and belief and as to those matters she believes the same to be true.

MARIA AMACKER.

Subscribed and sworn to before me this fifteenth day of March in the year of our Lord, 1892.

J. MILLER SMITH,
Notary Public.

Due and legal service of the within answer accepted this sixteenth day of March A. D. 1892.

CULLEN, SANDERS, and SHELTON,
Attys. for Plff.

[Endorsed]: Title of court and cause. Separate answer of Maria Amacker and John J. Amacker.

And thereafter to wit on the 18th day of December, A. D. 1895, the following agreed statement of facts was duly filed herein in the words and figures as follows, to-wit:

In the United States Circuit Court for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Complainant,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT.

Defendants.

Agreed Statement of Facts.

It is hereby stipulated, and agreed, by and between the parties hereto, that, for the purpose of the trial of this action, the following facts shall be deemed and taken to be true:

I.

That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route."

II.

That by the terms of said act, said company was authorized and empowered to lay out, locate, and construct a railroad and telegraph line, with the appurtenances, from a point on Lake Superior, in Minnesota or Wisconsin, thence westerly by the most eligible route, to be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place not more than three miles from its western terminus.

That by the third section of said act it was provided:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, and to secure the

safe and speedy transportation of the mails troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims of rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

That by the sixth section of said act of Congress, it was, among other things, enacted and provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-

emption before or after they are surveyed, except by said company as provided in this act."

III.

That said Northern Pacific Railroad Company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing, under the corporate seal of said company; duly executed pursuant to the directions of its board of directors first had and obtained, and within two years after the passage of said act, to-wit, December 29, 1864, severed such acceptance on the President of the United States.

IV.

That February 2, 1870, and March 10, 1870, the board of directors of said railroad company authorized the executive committee to survey and locate the main and branch lines of said railroad.

V.

That afterward to-wit July 8, 1870, the said executive committee of the board of directors of said railroad company, by resolution provided as follows:

"Resolved that the president cause a preliminary location with a map of the main road of the Northern Pacific Railroad company, commencing at Whatcom, on Puget Sound, thence running southerly on the easterly side of the said Sound to Portland, in Oregon, and from the point where the said railroad crosses the Columbia river, and

on the north side thereof and by the valley of the said river to the mouth of Snake river, to be filed in the office of the secretary of the department of the interior at Washington at as early date as practicable. Also to cause a like preliminary location with a map of the main line from the point on the Red river where the said road may cross the said river, running thence to the Missouri river at the point of intersection of the Yellowstone with the Missouri, and thence up the valley of the Yellowstone to a point in the Rocky Mountains, which shall be common to a line to be run either down the valley of the Salmon river or the Clearwater river, and to file the said map with the secretary of the interior at Washington."

VI.

That afterward, to-wit, July 26, 1870, the president of said railroad company transmitted to the secretary of the interior two maps showing the preliminary line of general route of said road, one exhibiting that portion of said road beginning on Lake Superior, at the mouth of the Montreal river, and extending thence to a point on the right bank of the Columbia river, opposite the mouth of Walla Walla river, in Washington; the other that portion extending from the mouth of Walla Walla river, westerly to the terminus on Puget Sound. That the line as shown upon said map was more than forty miles from the south half of the northwest quarter (S.$\frac{1}{2}$ N. W. $\frac{1}{4}$) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

That the said maps so transmitted to the secretary of the interior were received by that office on July 30, 1870. That August 4, 1870, and before said maps had been accepted by said secretary, and before any action had been taken with reference thereto, the engineer in chief of said railroad company, Edwin F. Johnston, addressed to the secretary of the interior the following letter:

"Northern Pacific Railroad Company.
Engineer's Office,
120 Broadway,
New York, Aug. 4th, 1870.

Hon. J. D. Cox, Secretary of the Interior,

Dr. Sir: From information received from my assistants in Montana and Idaho, since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder Creek on Jefferson river in Montana and the Columbia River.

There is reason to fear that the valley of the Salmon river may be found impracticable, in which case the company will be compelled to take the next valley to the north of it,—the Clearwater. The president of our company is absent for some days in Minnesota and I desire you not to take any action on the portion of the route named until he returns or I can communicate with him.

Yours very respectfully,

EDWIN F. JOHNSTON,
Eng. in Chf. N. Pacific R. R."

That said letter was duly received by the secretary of the interior, and thereafter, to-wit, August 5, 1870, the said secretary replied as follows:

"Department of the Interior,
Washington, D. C. August 5th, 1870.

Sir: I have received your letters of the 2nd and 4th instant—the first relatnig to the legislation as to the main line and branch of the Northern Pacific Railroad and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon river to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the president of the company.

In reply, I state that I see no objections to a compliance with your request and action will be accordingly suspended.

Very respectfully,
Your obt. servt.,
J. D. COX,
Secretary.

Edwin F. Johnston, Esq.,
Eng. in Chf. N. P. R. Co.
120 Broadway, New York."

That thereafter, to wit, August 13, 1870, the said secretary of the interior transmitted said map to the commissioner of the General Land Office, with the following instructions:

"Department of the Interior,

Washington, D. C. August 13, 1870.

Sir: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad

You will immediately direct the proper local land officer in the states of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead, and other disposal of the odd-numbered sections not sold, reserved, and to which prior rights have not been attached, within twenty miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd-numbered sections as lie south off the town of Stielacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully your obt. servant,

HON. JOS. S. WILSON,

Commissioner of the General Land Office."

Afterward, to-wit, in September, October, and November, 1870, the commissioner of the general land office, under the foregoing directions of the secretary of the interior, withdrew from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public land falling within twenty miles of, and coterminous with, that portion of said line extending through the states of Wis-

consin and Minnesota; and within forty miles of that portion of said line extending through the territory of Washington. That no action was then or ever thereafter, taken with reference to that portion of said line extending through the territories of Dakota, Montana and Idaho.

VII.

That thereafter the said Northern Pacific Railroad Company proceeded with the survey and location of the general route of its said railroad, extending from the Red river of the North westward to a point in Washington, on the eastern bank of the Columbia river, where it intersected the line of general route as shown upon the map filed August 13, 1870, and accepted and approved by the secretary of the interior; and having surveyed and located such portion of its said line of general route, it filed a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office, on the 21st day of February, 1872.

That thereafter, to-wit, April 22, 1872, the commissioner of the general land office under the direction of the secretary of the interior transmitted to the register and receiver of the United States district land office at Helena, Montana, a plat showing so much of said line of general route as extended through the district of lands for sale at said office at Helena, Montana, and designated thereon the limits including the lands coterminous with, and within forty miles of, said line, and transmitted with said map or diagram, the following:

"Department of the Interior.
General Land Office,
April 22, 1872.

Register & Receiver, Helena, Mont.,

Gentlemen: I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2nd, 1864, and by direction of the secretary of the interior you are hereby directed to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

You will also increase in price to $2.50 per acre the even numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption laws only. No private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,
WILLIS DRUMMOND,
Commissioner."

That said diagram and order of withdrawal were received at said United States district land office at Helena, and duly filed therein, May 6, 1872. That the land in controversy, to-wit, the south half of the northwest quarter (S. 1-2 N. W. 1-4) of section seventeen (17), township ten

north of range three (3) west, P. M. Montana, was on and within forty miles of said portion of said line as shown upon said diagram so transmitted to the United States district land office at Helena, Montana as aforesaid, and was included within the forty mile limits as designated on said diagram.

VIII.

That thereafter the said Northern Pacific Railroad Company surveyed and definitely located the line of its railroad, extending through said district of lands for sale at Helena, Montana, and July 6, 1882, fixed said definite location by filing a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office.

That the said line of definite location so fixed was coterminous with, and within twenty miles of, said land, hereinbefore described. That the plat showing that portion of said line of definite location was duly received and filed in the United States district land office, at Helena, Montana, June, 21, 1883.

IX.

That thereafter said Northern Pacific Railroad Company proceeded with the construction of its said railroad and telegraph line on, over and along its said line as so definitely located, and completed the same opposite to and coterminous with said described land on or about July 1, 1883. That the completion of said railroad and telegraph line having been reported to the President of the

United States, said President thereupon appointed three commissioners to examine the same, and it appearing to said commissioners that said portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by said act of Congress, they so reported to the President of the United States, and recommended that said portion of said railroad, being a section more than twenty miles in length, be accepted.

That thereafter, to-wit: on the 1st day of October, 1883, the said President of the United States duly approved the said recommendation, and directed that the patents earned by the construction of said railroad and telegraph line should be issued to said railroad company.

X.

That on July 2, 1864, the said south half of the north west quarter (S. $\frac{1}{2}$ N.W. $\frac{1}{4}$) of said section seventeen, township ten (10) north, of range three (3) west, P. M. Montana, was public land to which the United States had full title, not reserved sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That it was then, has been at all times since, and is now, non mineral land; and except as such condition may have been changed by the proceedings herein set forth, said land has been at all times herein mentioned, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That said describ-

ed land has been at all times, and is now, within the district of lands for sale at the United States district land office at Helena, Montana.

XI.

That October 5, 1868, one William M. Scott, then a citizen of the United States over twenty-one years of age filed in the United States district land office at Helena, Montana, his pre-emption declaratory statement, No. 179, under and in conformity with the provisions of the laws of the United States authorizing pre-emption cash entry of the public lands, wherein and whereby he made pre-emption claim to the south half of the northwest quarter (S. ½ N.W. ¼) and the north half of the southwest quarter (N. ½ S. W. ¼) of said section seventeen (17), township ten north, of range three (3) west, P. M. Montana, alleging settlement as of the same day. That said declaratory statementwas accepted and filed in the said United States district land office at Helena, Montana, and was duly and regularly noted on the records thereof. That such declaratory statement and filing is still of record in said land office and has never been canceled, unless cancellation results as a matter of law from the proceedings herein set forth? That said Scott settled upon said land on October 5, 1868, and afterward, to-wit, in the spring of 1869, built a house thereon and moved into it.

XII.

That October 20, 1869, said Scott filed his pre-emption declaratory statement No. 719, amendatory of said declaratory statement No. 179, in said United States district land office at Helena, Montana, wherein and whereby he alleged settlement upon, and asserted claim to, under the pre-emption laws of the United States, the south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast quarter of the northwest quarter (N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$) of said section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XIII.

That said Scott continued to reside upon said premises until the fall of 1869, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he moved to the city of Butte, Montana. That he never returned to said described land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and at the said time abandoned the said land.

XIV.

That October 14, 1872, said William M. Scott filed a new amended declaratory statement, No. 2807, under the pre-emption laws of the United States, wherein he alleged settlement upon certain described land, and made claim thereto under the said laws of the United States authoriz-

ing pre-emption cash entry of unoffered lands. That said declaratory statement did not cover or include the said south half of the northwest quarter (S. ½ N. W. ¼) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XV.

That May 3, 1872, one William McLean, being then a citizen of the United States over twenty-one years of age and qualified under the law to enter lands under the homestead laws of the United States, duly applied under an act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, to enter the west half of the northwest quarter (W. ½ N. W. ¼), the southeast quarter of the northwest quarter (S. E. ¼ N. E. ¼) and the southwest quarter of the northeast quarter (S. W. ¼ N. E. ¼) of section seventeen, township ten (10) north, of range three (3) west P. M. Montana, and was then and there permitted by the register and receiver of said United States district land office at Helena, Montana, to enter said land, under and in accordance with the provisions of said act of Congress; and that thereupon said McLean did make an affidavit as required by section 2290 of the Revised Statutes of the United States, and filed the same with the register and receiver of said land office; and his said entry was then and there noted upon the records of said office; and that the said William McLean in September, 1872, moved on to the said premises a frame dwelling-

house constructed of boards set up and down and covered with a shingle roof, and having a door and window, and put into said house a cook stove and its proper furniture, together with a bed, and from that time until the spring of 1873 spent his nights in said house upon said premises, and in the spring of 1873 he was married to the defendant Maria Amacker and ceased to reside on said premises.

XVI.

That on the first day of December, 1874, the commissioner of the general land office wrote to the register and receiver at Helena, Montana, that the said homestead entry of said McLean was held for cancellation, and for the reason that the same was made subsequent to the time at which the rights of the Northern Pacific Railroad Company attached to the said described land.

XVII.

That July 3, 1879, the register and receiver of the United States district land office at Helena, Montana, transmitted to the commissioner of the general land office the following letter, to-wit:

"United States Land Office,

Helena, Montana, July 3rd, 1879.

Hon. Com. Gen'l. Land Office, Washington, D. C.

Sir: We have the honor to report that June 2nd, 1879, the applicants to the following homestead entries were duly notified, in accordance with your circular of Decem-

ber 20th, 1879, to show cause within thirty days from date of said notice why their entries should not be canceled, and up to this date no action has been taken. No. 819, William McLean W. ½ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ¼ N. E. ¼, sec 17, 10 N., 3 W, made May 3, 1872.

We would respectfully recommend that these homestead entries be canceled.

Very respectfully,

J. H. MOE,
Register.
F. P. STERLING,
Receiver.

That said letter was duly received by said commissioner. That afterward, to-wit, September 11, 1879, said commissioners transmitted to the register and receiver of the United States land office at Helena, Montana, the following letter:

"Sept. 11, 1879.

Register and Receiver, Helena, Montana.

Gentlemen: I am in receipt of your letter of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified, in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz: No. 819, made May 3, 1872, by William McLean, W. ½ N. W. ¼ S. E. ¼ S. W. ¼ E. ¼ 17, 10 N. 3 W.

In view of the facts that the above entries were held for cancellation in November and December ,1874, and of the

further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and having failed to establish their claims after due notice given, the said entries are hereby cancelled

Advise the parties in interest.

J. M. ARMSTRONG,
Acting Commissioner."

The circular of December 20, 1873, referred to in the above letters, is as follows:

"Circular.
Department of the Interior,
General Land Office,
December 20, 1873.

Gentlemen: In a number of cases, persons who have initiated titles to the public lands under the homestead law have allowed the limitation provided by the statute to expire without making the final proof of settlement and cultivation required by the act.

Therefore, in all such cases as now exist in your district or may hereafter arise, you will notify the parties of their noncompliance with the law, and that thirty days from date of service of notice will be allowed to each of them within which to show cause why their claim shall not be declared forfeited and their entries canceled. At the expiration of that time you will report the reasons given, on, in case of failure, report that fact, so that in either event proper action may be had by this office.

But you will in no case allow the lands embraced in

such claims to be reinstated until you shall have received from this office a formal notice that the original entries have been positively canceled. I append a form of notice which you will be pleased to adopt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

Registers and Receivers, United States Land Offices.

Form of Notice.

A ..... B..... (place of residence, or, that being unknown address to the postoffice nearest to the land).

Sir: You are hereby notified that the homestead law requires final proof of settlement and cultivation to be made within two years after the expiration of five years from the date of entry and that in case of your entry No. ...., for .... dated .... the ....., the time fixed by the statute has expired without the requisite proof being filed by you. You will, therefore, within thirty days from the date of service of this notice, show cause before us why your claim shall not be declared forfeited and your entry canceled for noncompliance with the requirements of the law so that the case may be reported to the commissioner of the general land office for proper action.

(Date).

.....
Register.

.....
Receiver.

That the defendant, Maria Amacker (formerly Maria McLean) the widow of said William McLean, has not in her possession, and is unable to produce, a letter or order to said William McLean issued in 1879, or at all, directing him to show cause why his said entry should not be canceled, and has no knowledge that such order was ever received by said William McLean. That the custom of the United States district land office in sending out notice to show cause, under the said circular of December 20, 1873 is to issue the notice on the printed blank. That the said blank form is filled in with the name of the entryman and sent to the proper parties by registered mail, and no copy thereof, is retained in the land office. That after diligent search no copy of the letter claimed to have been sent to said McLean on June 2, 1869, has been found in said United States district land office. That it is not the practice to make an entry of the notice so sent out, further than by the copy of the letter advising the commissioner of the general land office of the transmission of such notice to the entryman. It was also the custom when such notice was sent to receive from the postmaster to whom the letter was delivered a receipt therefor, also a receipt from the person to whom it was sent, which it was the custom to send to the department as evidence that the notice was served; the records of the land office do not show any such receipt.

That until September 11, 1879, there was no cancellation of McLeans homestead entry, but that said homestead entry was canceled at said time in pursuance of the above letter of acting commissioner dated Sept. 11, 1879, and not otherwise.

XVIII.

That said McLean never settled upon or improved said described land.

XIX.

That said William McLean died in August, 1882; and that Maria Amacker (then Maria McLean, widow of deceased) was appointed his executrix, he left a will and testament which was duly admitted to probate by which he devised to said Maria McLean the premises in controversy.

XX.

That March 15, 1883, Maria McLean, widow of said William McLean, as such applied to the said United States district land office at Helena, Montana, to purchase said described land, and to perfect her husband's entry thereof, under the provisions of the act of Congress of June 15, 1880, and section 2291 of the revised statutes of the United States.

XXI.

That the said Northern Pacific Railroad Company contested said application. That the United States district land officers at Helena, Montana, awarded to said Maria McLean the right to purchase said tract under said application. That said Northern Pacific Railroad Company

thereupon appealed to the commissioner of the general land office from the action of the register and receiver and that February 20, 1885, the commissioner of the general land office sustained the application of said Maria McLean to purchase said described land, and confirmed the decision of the local land offices at Helena, Montana. That said railroad company appealed from said decision, and said decision was affirmed by acting secretary of the interior, H. S. Muldrow, on March 28, 1887. That the decision of the secretary of the interior and of the commission of the general land office, are in words and figures following:

Department of the Interior,
General Land Office.
Washington, D. C., Feb. 20th, 1885.

Register and Receiver, Helena, Montana Ter.,

Gentlemen: I have considered the cash entry of Maria McLean, widow of Wm. McLean, No. 1134, made March 15, 1883, under sec. 2 of act of June 15, 1880 (21 Stat. 237), on the W. ½ of N. W. ¼, S. E. ¼, N. W. ¼, and S. W. ¼ N. E. ¼, sec. 17, T. 10, N. B. three west.

Said tracts are within the withdrawal of odd-numbered sections for the benefit of the grant to the Northern Pacific Railroad Company, upon the map of the general route of said company's road filed in this office Feb. 21st, 1872, ordered by letter, from this office dated April 22, received at your office May 6th, 1872.

There are also within the forty mile (granted) limits of the definite located line of said company's road, the map of which was filed in this office, July 6, 1882.

The records show that the pre-emption declaratory statement covering said tracts were filed as follows:

No. 75, by A. J. Wetter, N. W. ¼ N. W. ¼, with other tracts, May 13, 1868, alleging settlement same day.

No. 179, by Wm. M. Scott, S. ½ N. W. ¼, with other tracts October 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. ¼ N. W. ¼, and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

No. 252, by Jerome S. Glick, S. W. ¼ N. E. ¼, with other tracts, Nov. 27, 1868, alleging settlement the same day.

No. 776, by Robert C. Wallace, S. W. ¼ N. E. ¼, with other tracts, December 13, 1869, alleging settlement the same day.

May 3, 1872, Wm. McLean made homestead entry No. 819 on said W. ¼ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ¼ N. E ¼.

The letter directing the withdrawal of the lands for the grant stated that the order would take effect from the date of its receipt at your office.

March 22, 1873, the secretary of the interior decided Copp L. L., 1875, p. 377) that the withdrawal took effect upon the filing and acceptance of the map of general route.

McLean's entry having been made after the filing of such map, was held for cancellation by this office Dec. 1, 1874, subject to appeal within sixty days.

No appeal was taken from this action. Under date July 3, 1879, the local officers reported that McLean had been duly notified pursuant to office circular of Dec. 20,

1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry. In view of the facts that the entry had been held for cancellation in 1874, and that McLean had allowed the statutory limit to expire without making proof required, and had also failed to establish his claim after due notice, said entry was canceled in this office Sept. 11, 1879, and you were so informed by letter of that date.

As shown by the certificate of the probate judge of Lewis and Clarke county, M. T., McLean died Aug. 20, 1882.

Mrs. McLean claims that her husband's entry was confirmed by section one (1) of act of April 21, 1876; that in view of said fact the cancellation of said entry was error; and that as his widow, she has the right to purchase under section 2 of the act of June 15, 1880, whereby payment of the piece of land is made equivalent to proof of compliance with the provisions of the homestead laws.

Sec. 1 of the act of April 21, 1876, provides that pre-emption and homestead entries of the public lands, made in good faith by actual settlers upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts, shall be confirmed and patents for the same shall be issued to the party entitled thereto

Section 2 of the act of June 15, 1880, provides that persons that have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homestead may have been attempted to be transferred by bona fide instrument in writing may entitle themselves to said land by paying the government price therefor with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

Counsel for the railroad company contends that the act of 1876 confirms only such entries wherein the homestead laws have been complied with and proper proofs thereof have been made; that McLean never invoked the relief provided by said act, but allowed his claim to expire, and suffered it to be canceled, as heretofore stated, more than three years after the passage of said act, without protest; that as the land had been withdrawn by legislative enactment before the entry was made, upon cancellation of the same the land became subject to the grant and the matter had become res adjudicate and other rights had attached at the time the act of 1880 became a law; and that the right of the company is held not only under the legislative withdrawal of 1872, but also under the definite location of its road in July, 1882.

This office has already decided that upon the death of a homestead entryman the right to purchase under the act of 1880 descended to his widow. (See to R. and R. Taylor's Falls, Minn., May 21, 1883, 10 C. L. O. 90. Also that

cancellation of an entry is no bar to purchase under said act. (Ex parte Mitchell, 10 C. L. O. 36).

It may be that the pre-emption claims herein mentioned subsisting at the date of the filing the map of the general route were sufficient to except the land from the withdrawal, which it is now held took effect upon such filing, but beyond the mere fact that they were then of record there is no evidence of the validity of such claims.

The object of the act of 1876 was to afford relief to persons who without a knowledge of the withdrawal had made entries on land prior to receipt of notice of such withdrawal at the local office since, as in this case, where there was a prior legislative withdrawal, such entries could not have been perfected without such legislation. It is true the act required the proof of the compliance with the provisions of the homestead law should be made.

Upon the passage of the act of 1880, however, it became optional with a homestead entryman to make proof of such compliance or to purchase the land, and such payment is accepted in lieu of proof. (A. G. and W. U. T. Co. vs. Martin, 10 C. L. O. 329.)

McLean's homestead entry is clearly within the terms of the act of 1880, in lieu of making proof of the compliance with the provisions of the homestead laws as to residences and cultivation was not affected by the definite location of the company's road is, in my opinion, settled by the action of this office and the department in the case of O'Dillon B. Whitford against said company. In that case Whitford had a homestead entry subsisting which excepted the land from the legislative withdrawal on gen-

eral route. His entry was canceled in 1879 for failure to make proof with statutory period.

After the road had been definitely located he was allowed to purchase under the act of 1880. Dec. 1, 1883, his cash entry was considered in this office and held for approval for patent upon the ground that his homestead excepted the land from the withdrawal on general route and from the grant. This decision was affirmed by the honorable acting secretary of the interior on appeal, Jan. 7, 1885.

In the case at the bar the act of 1876 took the land out of the withdrawal on the general route, and prior to definite location of the road, the act of 1880 conferred upon the entryman a right to pay for the same in place of making proof as required prior to that time, which right, under the decision above cited, was not affected by the definite location of the road, and, upon his death, descended to his widow.

Mrs. McLean's cash entry of the land in question is accordingly held for approval for patent, subject to appeal by the railroad company within sixty days.

Notice of this action will be given the parties in interest through their resident attorneys by letters of even date herewith.

Very respectfully,

N. C. McFARLAND,
Commissioner.

Department of the Interior,

Washington, March 28th, 1887.

NORTHERN PACIFIC R. R. Co.,

vs.

MARIA McLEAN.

Entry within limits of land grant prior to notice of withdrawal.

The Commissioner of the Land Office.

Sir: William McLean made homestead entry of the W. ½ of N. W. ¼, S. E. ¼ of N. W. ¼ and S. W. ¼ of N. E. ¼, sec. 17, T. 10 N., R. three west, Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd-numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21st, 1872, the withdrawal was made February 21st, 1872, notice of which was received at the local office May 6th, 1872. It is also within the forty mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the secretary decided that said withdrawal took effect upon the filing and acceptance of the map of the general route, whereupon, on December 1st, 1873, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was canceled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean, his widow, on March 15, 1883, made application to purchase said tract under the act of June 15th, 1880, upon the ground that her husband's entry being confirmed by the first section of the act of April 21, 1876 (19 Stat. No. 35), that payment for the land under the act of June 15, 1880, is equivalent to proof of compliance with the provisions of the homestead laws.

Your office awarded to Mrs. McLean the right to purchase holding that under the act of June 15, 1880, it became optional with the homestead entrymen, either to make proof of the compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed. At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter, for the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

Wm. M. Scott, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, with other tracts, Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, and again amended Oct. 14, 1872, to No. 2807 including said tract.

Jerome S. Glick, S. W. ¼ of N. E. ¼, with other tracts, Nov. 27, 1868, alleging settlement same day.

Robert C. Wallace, S. W. ¼ of N. E. ¼, with other tracts, Dec. 13, 1869, alleging settlement same day.

Prior to the act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims or unoffered lands, but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases, and all claimants of pre-emption right shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the land claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made one year; and this provision has since been enforced and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting capable of being perfected, and hence this tract of land not being perfected by the withdrawal for the benefit of the road, and the homestead entry of McLean was not controlled by the act of April 21, 1876.

In the case of the Northern Pacific Railroad Company versus Burt (3 L. D. 490), the department held that the widow of an entryman had the right to purchase under the act of June 15, 1880, although the entry had been canceled for failure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of departmental decisions. See, also, Gilbert versus Spearing, 4 L. D. 463; Holmes versus Northern Pacific Railroad Company, 5 L. D. 333.

Applying the rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision, and herewith transmit the papers.

Very respectfully,

A. L. MULDROW,
Actg. Sec.

XXII.

That afterward, to-wit, June 17, 1887, letters patent of the United States were issued to said Maria McLean, in the usual form, describing and purporting to convey to said Maria McLean, as widow of said William McLean, deceased, the west half of northwest quarter (N. W. $\frac{1}{2}$ N. W. $\frac{1}{4}$), southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$), and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of sections seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana. That said patent is sufficient in form and in all respects to convey, and did convey, the title to said described lands to said Maria McLean, now the defendant Maria Amacker, unless the title to said land had previously vested in the

Northern Pacific Railroad Company by virtue of said act of July 2, 1864.

XXIII.

That the said south half of the northwest quarter (S. ½ N. W. ¼) of said section seventeen (17), township ten (10) north, of range three (3) west, the land here in controversy, was, at the commencement of this action, of the value of twenty thousand dollars ($20,000), and is now worth over five thousand dollars ($5,000.00). That the said defendant Maria Amickar is in possession of the premises in controversy, as grantee under the patent from the United States issued to her therefor; and that the other defendants are in possession of said premises under and by virtue of conveyances from said Maria McLean (now Maria Amickar), and that the title of all the defendants is of the same quality.

XXIV.

That after the death of said William McLean, as hereinbefore set forth, his widow, Maria McLean, married the defendant, John J. Amickar.

F. M. DUDLEY,
CULLEN & TOOLE,
Solicitors for Complainant.
T. C. BACH and
MASSENA BULLARD,
Solicitors for Defendants.

[Endorsed]: Title of Court and Cause. Agreed Statement of Facts. Filed and Entered Dec. 18, 1895. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Findings of Fact and Conclusions of Law.

Be it remembered that this cause came on regularly for trial on the 19th day of December, 1895, before the court sitting without a jury, a trial by jury having been expressly waived by the parties thereto before the trial was commenced and the said cause having been submitted upon an agreed statement of facts, which said agreed statement is in writing and embraced in the stipulation between the

parties on file herein, and having been argued by counsel for both plaintiff and the defendants the same was by the court taken under advisement, and now upon this 3rd day of March, 1897, one of the days of the November term of said court, the court finding the facts herein as set forth in said agreed statement and stipulation, and as conclusion of law from said facts finds that the plaintiff is not and was not at any of the times mentioned in the complaint the owner of or entitled to the possession of the south half of the northwest quarter of section seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or any part thereof and that the defendants are entitled to the possession of said lands, and that the defendants are accordingly entitled to judgment and costs herein.

Dated March the 3rd, 1897.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Finding of Facts and Conclusion of Law. Filed March 3, 1897. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Judgment.

This cause came on regularly for trial on the 19th day of December, 1895, F. M. Dudley, Esq., and Messrs. Cullen and Toole appeared as counsel for plaintiff and Thomas C. Bach, Esq., and Massena Bullard, Esq., appeared as counsel for defendants. A trial by jury having been expressly waived by the counsel for the respective parties the cause was tried before the court sitting without a jury, whereupon, by written stipulation of the parties, the said

cause was submitted to the court for consideration and decision upon an agreed statement of facts, which stipulation embracing said facts is on file in said action, and after due deliberation thereon the court delivers its findings and decision in writing which is filed and ordered that judgment be entered in accordance therewith:

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the Northern Pacific Railroad Company, the plaintiff, take nothing herein, and that the defendants Maria Amicker, John J. Amicker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, and Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert do have and recover of and from the Northern Pacific Railroad Company, the plaintiff, the said defendant's costs and disbursements incurred in this action, amounting to the sum of ————, dollars.

Judgment entered March 3rd, 1897.

GEORGE W. SPROULE,
Clerk.

Attest a true copy:

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: Title of Court and Cause. Judgment. Filed and Entered March 3rd, 1897. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY,

versus

MARIA AMICKER, et al.

No. 140.

Clerk's Certificate to Judgment Roll.

George W. Sproule, clerk of the circuit court of the United States, for the Ninth Judicial Circuit, District of Montana, do hereby certify that foregoing papers heretofore annexed constitute the judgment roll in the above entitled action.

Attest my hand and the seal of said circuit court this 3rd day of March, 1897.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: Title of Court and Cause. Judgment Roll. Filed and Entered March 3rd, 1897.

And thereafter, to-wit, on the 15th day of June, 1897, the plaintiff herein filed its assignment of errors herein which said assignment of errors, is in the words and figures as follows, to-wit:

In the United States Circuit Court, for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Complainant,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Assignment of Errors.

Comes now the above-named complainant and assigns error on the record in the above-entitled case as follows, to-wit:

I.

The court failed to hold that the land described in the complaint was reserved for the benefit of the Northern Pacific Railroad Company from and after February 21, 1872.

II.

The court failed to hold that the lands in controversy

were public lands, not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other rights at the date that the said Northern Pacific Railroad coterminous with said lands was definitey fixed by the filing of a plat thereof in the office of the commissioner of the general land office.

III.

The judgment entered is not supported by the facts found.

IV.

The entry of judgment for the defendants and against the plaintiff.

Wherefore, plaintiff prays that the judgment rendered in this cause may be reversed and set aside, and held for naught.

WM. WALLACE, JR.,
F. M. DUDLEY,
Attorneys for Plaintiff.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed June 15, 1897. Geo. W. Sproule, Clerk.

And on said 15th day of June, 1897, the petition of said Northern Pacific Railroad Company, plaintiff, for a writ of error was duly filed herein in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Petition for Writ of Error.

And now comes the Northern Pacific Railroad Company, plaintiff herein, and says that on the 3rd day of March, 1897, this court entered judgment herein in favor of the defendants and against this plaintiff in which judgment and the proceedings had thereunto in this cause, certain

errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

F. M. DUDLEY and
WM. WALLACE, JR.,
Attorneys for the Plaintiff.

Let the writ of error issue as herein prayed.
Dated June 15, 1897.

HIRAM KNOWLES,
U. S. District Judge.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error and Order. Filed and Entered June 15, 1897. Geo. W. Sproule, Clerk.

And on said 15th day of June, 1897, the bond on writ of error was duly approved and filed, which said bond is in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY.

Plaintiff.

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Bond on Writ of Error.

Know all Men by These Presents, that we, Northern Pacific Railroad Company, as principal and E. W. Williams, and A. D. Edgar, as sureties, are held and firmly bound unto the above named defendants in the sum of $300.00, three hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, ad-

ministrators, and assigns, and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1897.

Whereas, the above named plaintiff, Northern Pacific Railroad Company, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled action on the 3rd day of March, A. D. 1897.

Now, therefore, the condition of this obligation is such that if the above named plaintiff, Northern Pacific Railroad Company, shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make said writ of error good, then this obligation to be void, otherwise the same shall be and remain in full force, virtue and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By WM. WALLACE, JR.,
Its Agent and Atty.
A. D. EDGAR, [Seal]
E. W. WILLIAMS. [Seal]

United States of America,
District of Montana. } ss.

E. W. Williams and A. D. Edgar, being duly sworn, each for himself deposes and says, that he is a resident of the state of Montana; and one of the sureties to the foregoing bond, that he is worth the sum specified therein as the penalty thereof over and above his just debts and liabilities and property by law exempt from execution.

A. D. EDGAR,
E. W. WILLIAMS.

Subscribed and sworn to before me this 15th day of June, 1897.

HARRY YEAGER,
Notary Public Lewis and Clarke County, State of Montana.

I hereby approve the within bond and sureties.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Bond. Filed. June 15, 1897. Geo. W. Sproule, Clerk.

And on said day a writ of error and citation were duly issued, served and filed which are hereto annexed:

Citation.

UNITED STATES OF AMERICA, ss.

To Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco and the State of California, on the 13th day of July, 1897, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the Ninth Circuit of the United States for the District of Montana, wherein Northern Pacific Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the said judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable HIRAM KNOWLES, judge of the District Court, of the United States, District of Montana, this 15th day of June, A. D. 1897, and of the Independence of the United States the one hundred and twentieth.

HIRAM KNOWLES,
Judge.

Service of the above citation is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,

Attorney for Defendants and Defendants in Error.

[Endorsed]: Citation. Filed June 15, 1897. Geo. W. Sproule, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Judges of the Circuit Court of the United States, Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the said Circuit Court, before you, between Northern Pacific Railroad Company, plaintiff, and Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo Dibert ,defendants, a manifest error hath happened, to the great damage of the said plaintiff, and plaintiff in error, Northern Pacific Railroad Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all

things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California on the 13th day of July, 1897, next, in the said United States Circuit Court of Appeals for the Ninth Circuit, to be then and there held; that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit, may cause to be done therein to correct that error, what of right, according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 15th day of June, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twentieth.

Attest: GEO. W. SPROULE,
Clerk.

The above writ of error is hereby allowed.

HIRAM KNOWLES,
Judge.

Service of the above writ of error is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,
Attorney for Defendants and Defendants in Error.

[Endorsed]: Writ of Error. Filed June 15, 1897. Geo. W. Sproule, Clerk.

Return to Writ of Error.

The answer of the judges of the Circuit Court of the United States for the District of Montana, to the foregoing writ:

The records and proceedings whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[Seal] GEO. W. SPROULE,
Clerk.

Clerk's Certificate to Transcript.

United States of America,
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing volume, consisting of 52 pages, numbered consecutively from 1 to 52 inclusive, is a true and correct and complete transcript of the pleadings, process, orders, judgment, and all proceedings had in said cause and of the whole thereof as appears from the orig-

inal files and records in said cause in said court, and I further certify that I have annexed to and included within said paging the original writ of error and citation, together with the proof of service thereof.

I further certify that the cost of said transcript is the sum of $16.10, and that the same has been paid by plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of said U. S. Circuit Court at Helena, in said District of Montana, this 5th day of July, A. D. 1897.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 386. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railroad Company, Plaintiff in Error, v. Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert, Defendants in Error. Transcript of Record. Error to the United States Circuit Court for the District of Montana.

Filed July 10, 1897.

F. D. MONCKTON,
Clerk.

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 386.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error*,

vs.

MARIA AMACKER, J. J. AMACKER, (her husband), G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED and GEO. DIBERT, *Defendants in Error.*

ERROR TO THE UNITED STATES CIRCUIT COURT, FOR THE DISTRICT OF MONTANA.

BRIEF OF PLAINTIFF IN ERROR.

FRED. M. DUDLEY,
Attorney for Plaintiff in Error.

J. R. Lambly, the Law Printer, Spokane.

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 386.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*

vs.

MARIA AMACKER, J. J. AMACKER, (her husband), G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED and GEO. DIBERT, *Defendants in Error.*

Error to the United States Circuit Court, for the District of Montana.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

This action was brought by the plaintiff in error to recover possession of the S½ of the NW¼ of section 17, township 10, north of range 3, west of the principal meridian, Montana. It was tried in the circuit court by the judge, a jury having been waived, May 23, 1892;

and judgment was entered in favor of the railroad company December 14, 1892. A writ of error was duly sued out to this court and the judgment of the lower court was reversed and the cause remanded to the circuit court for a new trial.

A new trial was had upon stipulated facts, a jury being waived, and March 3, 1897, judgment was entered in favor of the defendants in error. To correct this judgment the present writ of error is sued out.

The plaintiff in error claims title to the lands under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the Northern route." The third section of this act provides, among other things, as follows:

"That there be, and hereby is, granted to the 'Northern 'Pacific Railroad Company,' its successors and assigns, "for the purpose of aiding in the construction of said rail-"road and telegraph line to the Pacific coast, * * * "every alternate section of public land, not mineral, "designated by odd numbers, to the amount of twenty "alternate sections per mile, on each side of said rail-"road line, as said company may adopt, through the "territories of the United States, and ten alternate sec-"tions of land per mile on each side of said railroad "whenever it passes through any state, and whenever "on the line thereof the United States have full title, "not reserved, sold, granted, or otherwise appropriated, "and free from pre-emption or other claims or rights at "the time the line of said road is definitely fixed and

"a plat thereof filed in the office of the commissioner "of the general land office;"

The sixth section provides:

"That the president of the United States shall cause "the lands to be surveyed for forty miles in width on "both sides of the entire line of said road, after the "general route shall be fixed, and as fast as may be re- "quired by the construction of said railroad; and the "odd sections of land hereby granted shall not be liable "to sale, or entry, or pre-emption before or after they "are surveyed, except by said company as provided in "this act."

The stipulated facts show a compliance with the terms and conditions of this grant such as entitles the company to the land in controversy unless it fall within some of the exceptions from the grant enumerated in the third section. The material acts of compliance with the provisions of the grant are as follows:

a. That the company accepted the grant December 29, 1864. (Record, p. 17.)

b. That it fixed the general route of its road coterminus with and within forty miles of, the land in controversy February 21, 1872; and that April 22, 1872, the commissioner of the general land office directed the local land officers to withhold from sale or location, pre-emption, or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the forty mile limits coterminus with the general route. This order of withdrawal was received and

filed at the local land office at Helena May 6, 1872. (Record, pp. 22-23.)

c. July 6, 1882, the company definitely fixed the line of its road coterminus with the land, by filing a plat of such line of definite location in the office of the commissioner of the general land office. The land in question is within the limits of the grant as defined by this map of definite location. (Record, p. 24.)

d. Thereafter the railroad company duly constructed its road extending over the line thus definitely located, and completed the same as required by the granting act about July 1, 1883. (Record, pp. 24-25).

e. At the date of the grant the land in controversy was public land; and it is conceded to be non-mineral in character. (Record, p. 25.)

The contention of the defendant in error is that the land was excepted from the grant because of the existence of a claim or right attaching thereto at the date the line of the road coterminus therewith was definitely fixed by filing the plat thereof in the office of the commissioner of the general land office. The facts upon which this contention is based are as follows:

That October 5, 1868, one William M. Scott filed his pre-emption declaratory statement in the district land office for the S½ of the NW¼ and the N½ of the SW¼ of said section 17. (Record, p. 26.)

That May 3, 1872, William McLean applied to enter the W½ of the NW¼, the SE¼ of the NW¼ and the SW¼ of the NE¼ as a homestead under the provisions

of the act of congress approved May 20, 1862, and established a residence upon said land in September, 1872. (Record, p. 28.)

Scott, however, filed an amended declaratory statement October 20, 1869, wherein he changed the description of the land claimed by him so as to cover the S½ of the NW¼ and the NE¼ of the NW¼ of section 17. (Record, p. 27.) He abandoned the land in the fall of 1869. (Record, p. 27.) And October 14, 1872, he filed a second amended declaratory statement under the pre-emption laws. This second amended declaratory statement did not cover or include any of the land in controversy. (Record, p. 27.)

William McLean, after entering the W½ of the NW¼, the SE¼ of the NW¼, and the SW¼ of the NE¼, of said section 17 in 1872, as above stated, established his residence thereon, and lived upon the land until the spring of 1873, after which time he ceased to reside thereon. (Record, pp. 28-9.) December 1, 1874, the commissioner of the general land office wrote to the register and receiver of the local land office that McLean's entry was held for cancellation, because made subsequent to the time at which the rights of the Northern Pacific Railroad Company attached to the land in controversy. (Record, p. 29.) July 3, 1879, the register and receiver of the local land office reported to the commissioner of the general land office that December 20, 1879, McLean had been ordered to show cause within thirty days after said notice why his entry should not be cancelled; that no action had been taken; and they recommended that his entry be cancelled. September 11, 1879, the com-

missioner formally cancelled the entries and advised the local land office thereof. (Record, pp. 29-31.)

McLean died in August, 1882, leaving a widow, Maria McLean, (the defendant Maria Amacker); and March 15, 1883, Mrs. Amacker, as the widow of McLean, applied at the local land office to enter the land in controversy under the provisions of the act of congress approved June 15, 1880, and section 2291 of the revised statutes of the United States. (Record, p. 34.) This application was contested by the railroad company; but was finally decided by the secretary of the interior in favor of Mrs. McLean, March 28, 1887. (Record, pp. 34 to 44.) The grounds of the departmental decision were that the act of June 15, 1880, conferred upon the widow of the entryman a right to enter the land, which right was sufficient to except the land from the grant to the railroad company. June 17, 1887, letters patent of the United States were issued to Mrs. McLean for the land in controversy, with other lands. (Record, p. 44.) The defendants other than Maria Amacker assert title to the premises in controversy under and by virtue of conveyances from her.

Upon these facts the circuit court entered a judgment in favor of the defendant, holding that the land was excepted from the grant to the railroad company by the entries and claims described.

Assignments of Error.

First.—The court failed to hold that the land described in the complaint was reserved for the benefit of

the Northern Pacific Railroad Company from and after February 21, 1872.

Second.—The court failed to hold that the land in controversy was public land, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other rights at the date that the said Northern Pacific Railroad coterminus with said lands was definitely fixed by the filing of a plat thereof in the office of the commissioner of the general land office.

Third.—The judgment entered is not supported by the facts found.

Fourth.—The entry of judgment for the defendants and against the plaintiff.

Points and Authorities.

I.

SCOTT'S FILING MADE OCTOBER 5, 1868, WAS CANCELED OF RECORD BY THE SUBSEQUENT FILING OF AMENDED DECLARATORY STATEMENTS.

a. October 28, 1869, Scott filed an amended declaratory statement, wherein he asserted claim to lands in part different from those included in his original statement. Under the statute he could file but one statement. Says the supreme court:

"The tract applied for in the second declaration need "not be an entirely separate and distinct parcel to call "into effect the prohibition; it is enough if there be such "addition to the original land applied for as to justify

"the designation of it, with the addition, as a different "tract. With the filing of the first declaration the ap- "plicant is limited to the land designated, whether less "or different from what he supposed he could claim, or "what he may subsequently desire to acquire. The "prohibition of the statute is without qualification or ex- "ception, and the rights of the pre-emptor must be meas- "ured by it."

Sanford v. Sanford, 139 U. S., 642, 648.

The filing of this second statement was, therefore, inconsistent with his first statement; and was a record abandonment of the claim asserted therein which operated as a cancellation of the first filing.

Amacker v. N. P. R. R. Co. (C. C. A.), 58 Fed., 850, 852.

b. The second amended declaratory statement filed by Scott October 14, 1872, did not include any of the land in controversy and was, therefore, an effectual cancellation of his first filing as far as this land is concerned.

Amacker v. N. P. R. R. Co., 58 Fed., 850, 852.

II.

THE LAND IN CONTROVERSY WAS RESERVED FROM SALE, PRE-EMPTION OR ENTRY, EXCEPT BY THE RAILROAD COMPANY, FROM AND AFTER FEBRUARY 21, 1872.

The stipulated facts establish that the general route of the road coterminus with this land and within forty miles thereof, was fixed February 21, 1872. It is settled

that the effect of section 6 of the act of July 2, 1864, is to prohibit the sale, pre-emption or entry of the lands coterminus with the line of general route and within forty miles thereof after the general route is fixed.

Buttz v. N. P. R. R. Co., 119 U. S., 55, 72.
St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 17.
Menotti v. Dillon, 167 U. S., 703, 720-1.

The land being public land at the time when the general route of the road was fixed, this prohibition against its entry at once attached.

Denny v. Dodson, 32 Fed. Rep., 899, 909.
St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 18.

III.

THE ENTRY OF MCLEAN MADE MAY 3, 1872, WAS VOID.

The land in controversy being withdraw by operation of law from sale, pre-emption or entry, was not subject to entry at the date when McLean attempted to enter the same, and his attempted entry was, therefore, void.

Van Wyck v. Knevals, 106 U. S., 360, 367.
Hamblin v. Western Land Co., 147 U. S., 531, 536.
Wood v. Beach, 156 U. S., 548, 549.

It is contended, however, that this entry was cured by the provisions of the act of congress approved April 21, 1876, entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of

railroad grants in cases where such entries have been made under the regulations of the land department."

Section one of this act provides as follows:

"Section 1. That all pre-emption and homestead "entries, or entries in compliance with any law of the "United States, of the public lands, made in good faith, "by actual settlers, upon tracts of land of not more "than one hundred and sixty acres each, within the "limits of any land grant, prior to the time when notice "of the withdrawal of the lands embraced in such grant "was received at the local land office of the district in "which such lands are situated, or after their restora- "tion to market by order of the general land office, "and where the pre-emption and homestead laws have "been complied with, and proper proofs thereof have "been made by the parties holding such tracts or par- "cels, they shall be confirmed, and patents for the same "shall issue to the parties entitled thereto."

19 Stat., 35.

We submit this statute does not support the defendants' contention.

a. If the act of 1876 is to receive a construction making it apply to the legislative reservation created by section six of the act of July 2, 1864, it must be construed as amending such section, and, *pro tanto*, repealing it. It contains no words of repeal. It is purely affirmative in its nature; and if it operates to amend and repeal the provisions of said section six so as to make the legislative reservation therein created depend upon the purely discretionary act of the executive, it

does so only by implication. Such repeals are not favored; and if the two acts can, upon any reasonable construction, stand together, such construction will be adopted; and, under this rule of construction, a general statute will not be construed as repealing a special one, unless there is a plain indication of an intention so to do.

Third Nat. Bank v. Harrison, 3 McCreary, 164.
Ex parte Crow Dog, 109 U. S., 570.
In re. Manufacturers' National Bank, 5 Bissel, 502, 508.
State v. Treasurer, 41 Mo., 24.
Sutherland on Statutory Construction, §§ 157-8-9.

The charter of the Northern Pacific Railroad Company being a special act, while the act of April 21, 1876, is general, and there being no plain indication in the act of 1876 of an intention to repeal or modify the provisions of said section six of the Northern Pacific charter, that act will not be construed as having such effect.

Nor are the two acts inconsistent. An analysis of the act of 1876 shows that it refers only to withdrawals made by executive order. It confirms entries made prior to the time "when notice of the withdrawal of the lands embraced in such grant was received at the local land office." It therefore contemplated cases where "notice of the withdrawal" was to be sent to the local land office. The sixth section of the Nothern Pacific act did not require or contemplate a sending of notice of the filing of the map to the local land office. As said in the decisions heretofore cited, the reservation became

effective, *eo instanti*, upon the filing of the map in the office of the commissioner of the general land office. If notice of that act was never sent to the local land office the withdrawal remained unaffected.

St. P. & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 18.

Only by a strained construction, therefore, could the act of 1876 be held to apply to, or to affect the reservation created by, section six of the act of July 2, 1864.

This construction of the act of 1876 restricting its application to cases where notice of the withdrawal was required to be sent to the local land office, *i. e.*, to executive withdrawals, harmonizes and renders clear the terms used therein, which otherwise must be taken as used with an entire disregard for their ordinary and proper meaning.

Thus the act confirms entries made in "compliance with any law of the United States of the public lands." An act is done in compliance with a law when it is done in conformity with or under the law. The sixth section of the act of 1864 having provided that entries should not be made upon the land in controversy, it is difficult to see how an entry upon such land could be deemed an entry made "in compliance with law." And that section having taken the land in controversy out of the category of "public lands," an entry thereof would not be within the terms of the confirmatory act of 1876. And it is certainly a strained construction to hold that congress, when it confirmed entries made "in compliance with law" of the "public lands," intended to con-

firm an entry made in defiance of law upon reserved lands.

Wilcox v. Jackson, 13 Pet., 498, 514.

It should be further noted that the act provides that the entry shall be "confirmed." To confirm is to complete or establish that which was imperfect or uncertain. An entry made upon lands reserved by act of congress does not create an imperfect or voidable estate, but creates no estate whatever. It is not voidable, but is void *ab initio*.

Smelting Co. v. Kemp, 104 U. S., 636, 641.
Doolan v. Carr, 125 U. S., 618, 624, *et seq.*

And the use of the term "confirmed" in the act is not consistent with an interpretation of the act which would make it validate entries absolutely void. And although a homestead or pre-emption entry made upon lands reserved by order of the president was also forbidden by act of congress, the term "confirmed" is correctly used if the act of 1876 be restricted in its application to executive withdrawals, for the reason that the act is a legislative construction of prior executive orders of withdrawal. It is a legislative declaration that such orders of withdrawal are not effective until notice thereof is given to the local land office; and that entries made prior to such time were rightfully made and are by the act confirmed.

This interpretation of this act has received the sanction of the courts.

Taboreck v. B. & M. R. R. Co., 13 Fed. Rep., 103, 105.

B. & M. R. R. Co. v. Lawson (Ia.), 12 N. W. Rep., 229, 231.

A. T. & S. F. R. R. Co. v. Bobb, 24 Kas., 673.

Emelie v. Young, 24 Kas., 732, 743.

b. The provisions of the act of April 21, 1876, are confined to cases "where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels." The stipulated facts in this case are that McLean abandoned the land in controversy in the spring of 1873, and that he never offered proof of compliance with the homestead act. (Record, pp. 28-9, 29-34.)

IV.

THE LAND IN CONTROVERSY WAS PUBLIC LAND, NOT RESERVED, SOLD, GRANTED OR OTHERWISE APPROPRIATED, AND WAS FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS AT THE DATE WHEN THE LINE OF THE ROAD COTERMINUS THEREWITH WAS DEFINITELY FIXED BY THE FILING OF A PLAT THEREOF IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The map of definite location was filed in the office of the commissioner of the general land office July 6, 1882. (Record, p. 24.) Prior to this time, to-wit: September 11, 1879, the entry of McLean was formally cancelled upon the land office records for failure to prove up within the time prescribed by law. (Record p. 29.) There was therefore no adverse claim to the land at the date of definite location which could defeat the grant, unless such claim arose by virtue of the provisions of the act of congress approved June 15, 1880, entitled: "An act re-

lating to the public lands of the United States." By this act congress provided:

"Section 2. That persons who have heretofore un-
"der any of the homestead laws entered lands properly
"subject to such entry, or persons to whom the right of
"those having so entered for homesteads, may have been
"attempted to be transferred by *bona fide* instrument in
"writing, may entitle themselves to said lands by pay-
"ing the government price therefor, and in no case less
"than one dollar and twenty-five cents per acre, and the
"amount heretofore paid the government upon said
"lands shall be taken as part payment of said price:
"*provided*, this shall in no wise interfere with the rights
"or claims of others who may have subsequently en-
"tered such lands under the homestead laws."

21 *Stat.*, 238.

It is urged by defendant in error that this section operated to vest in McLean and, after his death, in his widow, a right to purchase this land, which right was sufficient to exclude the land from the grant to the railroad company; and this proposition of law is the basis for the decision of the secretary of the interior relative to this land made in the contest between these parties before him. (Record, 41.)

a. The act authorizes the purchase of lands only when the lands entered were "lands properly subject to such entry." The land in question being reserved for the railroad company prior to the date of McLean's attempted entry, it did not come within the provisions of the act of 1880.

F. C. & P. R. R. Co. v. Carter, 14 L. D., 103.

b. The act of 1880 does not give a preference right of purchase—a pre-emption right or claim—attaching to the land. The privilege of purchasing the land previously entered is a privilege to be exercised only upon lands to which no intervening rights or claims have attached.

The terms employed in conferring the rights are that the parties "may entitle themselves to such lands by paying the government price therefor." These terms are not indicative of an intention to give a preference right of purchase. They are words of permission, not of grant. An examination of the various acts of congress, wherein pre-emption rights have been confirmed, show that it has been the invariable practice to designate the right conferred as a pre-emptive or preference right. The entire absence of such terms in this act coupled with the uniform use of such terms in other acts, is significant of an intention not to confer such pre-emption rights by this act.

Galliher v. Cadwell, 145 U. S., 368, 371.

This construction is further confirmed by the proviso that this right of purchase "shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." This proviso expressly contemplates the initiation of rights and claims which shall defeat the right of purchase conferred in the first clause of the section. The term "homestead laws" is not used in a technical sense, restricting the proviso to claims and rights initiated under what are technically known as the homestead laws, but as a generic term intended to embrace all rights or

claims that may have intervened under any of the public land laws prior to the application to purchase.

Circular of Instructions of Oct. 9, 1880, 7 Copp's L. O., 142.
William White, 1 L. D., 55.
George M. Bishop, 1 L. D., 69.
Samuel L. Mitchell, 1 L. D., 97.
Pomeroy v. Wright, 2 L. D., 164.
Charles W. Martin, 3 L. D., 373.
Freise v. Hobson, 4 L. D., 580.
Lyons v. O'Shaughnessy, 5 L. D., 606.
N. P. R. R. Co. v. Elder, 6 L. D., 409.
Clement v. Henry, 6 L. D., 641.
Nuttle v. Leach, 7 L. D., 325.
Craig v. Howard, 7 L. D., 329.
Puckett v. Kaufman, 10 L. D., 410.
Havel v. Havel, 12 L. D., 320.
Williams v. Doris, 13 L. D., 487.

Any other construction of the section would make it vest in the party who had once made an entry of the land, but whose entry had been canceled for fraud, abandonment or failure to comply with the laws, a preference of right of entry which would defeat any disposition of the land except to another homestead settler. It would vest in the entryman who, as shown by the cancellation of his first entry, had done nothing to entitle himself to the consideration of the government, a pre-emptive right superior to any that the United States has ever attempted to confer upon settlers who have in good faith attempted to secure title to the public domain. It would confer upon an entryman, without merit, a perpetual prefer-

ence right of purchase which would prevent the disposition of the lands even by congress itself. Only the clearest language would justify a construction which would impute such an intention to congress.

The history of the act further confirms our construction. The purpose of the act was not to confer rights upon a meritorious class of settlers, but to give amnesty to those who were, in the eyes of the law, criminals. It was to enable those who, under the fraudulent guise of entry had removed the timber from the public domain, to condone their offences by the purchase of the land which they had robbed. See:

Congressional Record, 2d session 46th Congress, pp. 128-9, 1564-77, 3577-85, 3627-32, 4247-49.

This construction is further sustained by the decisions of the interior department and the courts.

Nathaniel Banks, 8 L. D., 532.
N. P. R. R. Co. v. Matthews, 15 L. D., 81.
Malloy v. Cook (Ala.), 10 So. Rep., 349, 350.
U. S. v. Perkins, 44 Fed. Rep., 670, 672.

The privilege of purchasing the land not being a preference right or claim, is not such a claim or right as will exclude land from the grant made by the act of July 2, 1864. It is precisely the privilege which every person had to acquire lands by purchase when offered for public sale, or for private entry. And as, notwithstanding the existence of the right to purchase, the land remained open to disposition under the general public land laws, it remained public land in the fullest

sense of the word and was not excluded from a grant which passed all lands not reserved, sold, granted or otherwise appropriated and which were free from pre-emption or other claims or rights.

c. McLean having voluntarily abandoned the land, the act of June 15, 1880, gave him no claim or right thereto. (Record, pp. 28-9.)

Amacker v. N. P. R. R. Co. (C. C. A.), 58 Fed. Rep., 850, 853-4.

d. The act of June 15, 1880, did not authorize the entry of the land by the widow of McLean.

Galliher v. Cadwell, 145 U. S., 368, 370-1.

V.

IT WAS ERROR TO ENTER JUDGMENT FOR THE DEFENDANTS AND AGAINST THE PLAINTIFF.

The land in question being public land at the date of the grant to the Northern Pacific Railroad Company; and not reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights at the date when the line of the road coterminus therewith was definitely fixed, the title passed under the grant of 1864 to the railroad company. The patent issued to Mrs. McLean was void; and the company is entitled to prevail in this action.

Respectfully submitted,

F. M. DUDLEY,
Attorney for Plaintiff in Error.

No. 391.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY,

Plaintiff in Error,

vs.

H. W. BAKER.

TRANSCRIPT OF RECORD.

Error to the United States Circuit Court for the District of Washington, Northern Division.

INDEX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

H. W. BAKER,
Defendant in Error.

Stipulation that Parts Only of Record be Printed.

It is hereby stipulated between the parties to this cause, by their respective attorneys of record in the Court below, in pursuance of section 7 of rule 14 of the rules of this Court, adopted on November 1, 1894, that such parts only of the record in this cause in this Court, consisting of the transcript sent up from the Court below as the return of that Court to the writ of error herein, shall be printed as are not included in the parts of said record hereinbelow specified, and that the parts of said record hereinbelow specified shall be omitted in printing said record; and

that it is unnecessary to include in the printed record herein any of said parts so to be omitted therefrom in order to present fully to this Court all the points raised by the assignment of errors filed with the writ of error herein. Said parts so to be omitted are the following:

The title of the court and cause in the caption of each separate paper included in the record except the complaint and answer; the omission of such titles severally to be indicated by the insertion in the printed record, within parentheses, of the words "Title of Court and Cause," in the respective places where said title occur.

Also the following:

Description of Omitted Parts.

Transcript
page.

Notice of intention to move for new trial.

Bond for costs and supersedeas on writ of error.

Copy of writ of error.

Praecipe for transcript.

This stipulation shall not be deemed or taken to be a general appearance in this Court of the defendant in error in this cause, but shall be taken to be only a special appearance on his part solely for the purposes of this stipulation.

Dated July 9th, 1897.

I. D. McCUTCHEON and
BURLEIGH & PILES,
Attorneys for Plaintiff in Error.

PRESTON, CARR & GILMAN,
Attorneys for Defendant in Error.

[Endorsed]: Filed Aug. 3, 1897. F. D. Monckton, Clerk.

In the United States Circuit Court, Northern Division, State of Washington.

H. W. BAKER,
Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.
No. 244

Complaint.

The plaintiff for complain t against the defendant, alleges:

I.

That he is and for more than five years last past has been and at this time now is a citizen of the State of Washington (formerly territory), residing in the county of King, and is a resident of the city of Seattle, in the said county of King, State of Washington.

II.

That the defendant is a corporation, known as a telegraph corporation, organized under the laws of the State of New York, is a citizen of the State of New York, and having, among other places, a place of business in the city of Seattle, King county, and does a general telegraph business over the United States of America, and especially from the city of New York through to the said city of Seattle, in the sending and receiving and general transmission of telegraph messages, and is not a citizen of the State of Washington, but is a foreign corporation and citizen, as heretofore stated.

III.

That the said firm of H. W. Baker & Co. was a partnership consisting of H. W. Baker, this plaintiff, W. H. Wilson, and J. D. Adams, and as such partnership were, on the 7th day of September, 1891, and for more than two years prior thereto had been general commission merchants and brokers, with established headquarters and established business, generally known in the community and well understood in the business circles of the community, and especially to the defendant as such general commission and brokerage house, and also as the consignees and consignors of general merchandise and as general shippers. That their place of address was the city of Seattle, more particularly on the water front of

the city of Seattle, being at the foot of University street in the city of Seattle, all of which fact was generally known and understood by all the business community of the city of Seattle, and especially the defendant, at all times hereinbefore and hereinafter mentioned.

IV.

....

V.

That on the fourth day of September, 1891, the said H. W. Baker & Co. had occasion, as such commission merchants, in the due process of their business, dealing with merchants, to consign a certain cargo of lumber, consisting of one million two hundred and seventy one thousand seven hundred and ninety (1,271,790) feet, in that certain ship known as the ship "W. H. Lincoln," and did have occasion upon the said date to ship the said ship containing the said consignment of lumber to that certain place in Australia known as Sydney, being a large city, having business communication with the said city of Seattle and the said H. W. Baker & Co. That the said H. W. Baker & Co. as such commission merchants and consignors did, on the fourth day of September, 1891, duly consign and ship that certain ship, "W. H. Lincoln," to Sydney, consigned to the commission house of B. Singer, at the said town of Sydney, for the purpose of the disposition of said cargo of lumber according to the market

rates in the open market to the best of the capacity of the said commission house, according to the best rate to be obtained in the market, which rate was to be first made known to the said H. W. Baker & Co., their acceptance or rejection to be manifested and made known to the said B. Singer at Sydney, which was to be done upon the receipt from the said B. Singer at Sydney of the figures to be obtained in theopen market and from the buyer who desired to buy the said cargo from the said "W. H. Lincoln," which had been in its manner and course the usual course and custom and proper manner and course of the consigning of cargoes and the disposition of the same in the open and usual course of commerce, and especially of consignments of lumber, in the manner and form as the said "W. H. Lincoln" was consigned and shipped and the cargo of lumber therein.

VI.

That after the said shipment of the said "W. H. Lincoln" and the said cargo of lumber to the said B. Singer at Sydney, the said B. Singer at Sydney was duly notified by the said H. W. Baker & Co. of the said consignment and requested that he wire the figure to be obtained, the said telegram going over the said defendant's wires, and from thence to be cabled to Australia, the said message being sent then and there by the said H. W. Baker & Co., and of its nature calling for an answer, and of its nature informing the said defendant that the same called for an answer, and to whom the answer was due, the emergency

and the importance of quick transmission and quick delivery of the answer thereto to the said H. W. Baker & Co. That the said message was duly signed, according to the general signature to such messages, duly sent over the said defendant's wires, and well understood by the defendant as the signature to the said messages which were sent as cablegrams, to wit, being the word "Baker." That the said telegram so signed informing the said Singer of the said consignment of the said ship "Lincoln" containing the said lumber was duly sent on September 7th, 1891, and the said message informing the said Singer of the consignment of the said lumber in the said ship "Lincoln" was dispatched over the defendant's wires to New York, and cabled per direction by the defendant via Eastern Route. That the said H. W. Baker & Co. waited for reply in order to know what disposition could be made of the cargo, and what price could be secured in theopen market, according to the rates of the market at the said Sydney, Australia, and on October 1, 1891, said B. Singer, from the said town of Sydney in Australia did cable and dispatch to the said defendant a telegram as follows: "To Baker, Seattle, offered four thousand pounds cif advise accept market dull no outlet." That the said defendant, at the said city of New York, or on its said line from New York to the said city of Seattle, well knowing the importance of said message, well understanding the import and emergency of the said message from the contents thereof, negligently, carelessly, and wrongfully misdirected the said message, and wrongfully, negligently, and carelessly wrote the word "Barker" instead of and in

place of the word "Baker." That when the message arrived at the city of Seattle over the said defendant's lines, after the said defendant had so negligently and wrongfully and carelessly so misdirected the said message, the said message was permitted by the said defendant to remain in defendant's office at the city of Seattle, during the time of its transmission and preparation for transmission, and the said defendant, at the city of Seattle, well knowing through its agents and representatives, that the said message was important, emergent, and was in reply to one message sent by the said H. W. Baker & Co. to the said Singer, and knowing the importance of its quick delivery, and having full knowledge to whom the said message was intended and for whom it was written, and to whom the information therein was to be imparted, did wrongfully, negligently, and carelessly refuse to exercise care in the delivery of the said message or ascertain of whom the said message was for. . . . .

VII.

That the said telegram was duly sent over the said defendant's wires, the said defendant receiving the said telegram as the carrier of telegrams and messages for value received, and the said defendant was duly paid and did receive and accept due pay and consideration for the prompt and correct transmission of the said telegram from the said B. Singer to the said H. W. Baker & Co., and did, both by its relations to the public and its public capacity as a public corporation, and its contract from the

said B. Singer and the said W. H. Baker & Co., at the time of the receipt of the said telegram, contract and agree and promise to correctly, faithfully, accurately, diligently, and carefully and with promptness receive, transmit, and deliver the said telegram from the said B. Singer to the said H. W. Baker & Co.

VIII.

That the said defendant . . . . in the city of Seattle, on the receipt of the telegram, instead of delivering the said telegram with promptness and diligence to H. W. Baker & Co., did carelessly, negligenty, and wrongfully deliver the said telegram to one Abram Barker, that is, did deliver the said telegram to the place of business of the said Abram Barker, who at the time resided in the city of Seattle, was in nowise engaged in the commission business nor in any business whatsoever like unto the commission business or the brokerage business or in any business whatsoever indicating the possibility that the said telegram could be for Barker, or any other person other than the said H. W. Baker & Co.

IX.

That at the time of the said telegram as aforesaid being sent by the said B. Singer to the said H. W. Baker & Co., to wit, on October 1, 1891, the said market price of the said lumber so shipped and consigned in the said ship, "W. H. Lincoln" was the sum of four pounds a thousand,

English sterling, being, in American money, the sum of twenty dollars ($20.00) per thousand. That the said lumber would have brought in the open market at Australia, to wit, at the said town of Sydney, to which town the said lumber was consigned, on the said date of October first, and for three days thereafter, the said aforesaid sum of four pounds sterling per thousand, which was a proper and reasonable market price for the said lumber and for the said cargo of the said ship "W.H.Lincoln." That had the said telegram which was intended for the said H.W. Baker & Co., on the said date been delivered with reasonable prudence, care, and caution, ordinary prudence, and as the duty of the said defendant required to the said H. W. Baker & Co., the said telegram and the said information therein contained would have been received by the said H. W. Baker & Co., on the said October 1st from the said B. Singer, which information of the condition of the market and of the price to be obtained for the said lumber was the only information to be had by the said H. W. Baker & Co., and the said telegram the only means the said H. W. Baker & Co. had of knowing the acceptance by the said Singer and the amount to be received than upon the said delivery of the said telegram in a reasonable time as intended, said H. W. Baker & Co. would have and could have accepted the same, as the same was reasonable and a fair market price, and the said cargo would then and there, to wit, on October first or October second, in which time, either October first or October second, the said Singer could have been

notified and would have been notified of the acceptance by the said H. W. Baker & Co. of the said four pounds sterling per thousand as aforesaid, and then and there the said offer could have been closed and the said cargo duly sold to the said Singer at the said price of four pounds sterling per thousand, which said sum the said Singer would pay and did intend then to pay and was ready to pay for the said cargo and to have paid for the said cargo and for the said lumber, and would have so paid had the said telegram from the said Singer been delivered to the said H. W. Baker & Co. with reasonalbe promptness and care in any reasonable time whatsoever, and the answer to the same, accepting the same, been forwarded, which would have been done, to the said Singer at Sydney as aforesaid.

X.

That immediately after October second and third the said market for the said lumber at the said town of Sydney where the said ship "Lincoln" had arrived containing the said lumber, did go down, and the said lumber and the said market fall to a small price; and although every effort and every diligence and all care, caution, and expediency was exercised by the said H. W. Baker & Co. (after the receipt of the said telegram intended for H. W. Baker & Co., and so misdirected and misdelivered by this said defendant to Barker) to sell and dispose of the said cargo in the quickest reasonable length of time that could be done with diligence, promptness, and reasonable ex-

ercise of prudence and business capacity, but yet, notwithstanding such, it was wholly impossible to sell the said cargo or dispose of the same in the open market or sell the said cargo or dispose of the same in the open market or in any wise whatsoever for any greater or other sum than the sum of eight hundred and thirty-three and twenty-seven one-hundredths dollars ($833.27) for which sum it was necessary that the said cargo be sold, which sum was the only sum for which said cargo was sold, which was the only and reasonable sum that could be obtained at such time of the said sale, which sale was made with all the promptness that the market afforded, and the full and whole sum realized from the said cargo by the said H. W. Baker & Co., by reason of the situation and the circumstances herein, and of the sale at the said time, was the sum of eight hundred and thirty-three and twenty-seven one-hundredths ($833.27).

XI.

That had the said telegram from the said Singer of October first, as addressed and intended for H. W. Baker & Co., and as the defendants well knew and must have well known and could have well known and understood as aforesaid been delivered or the contents of the same been informed to the said H. W. Baker & Co., that then and there, according to the amount offered in the said telegram and the condition of the market, the said assignment and the said cargo of lumber, consisting of one mil-

lion two hundred and seventy one thousand seven hundred and ninety feet, would have been sold and transferred for the sum of four pounds sterling per thousand, and would have netted to the said H. W. Baker & Co., the sum of seventy-seven hundred and forty-two and 53-100 dollars ($7742.53), which would have been but a reasonable sum for the said cargo; but by reason of the said carelessness, negligent, and wrongful conduct of the said defendant in the misdirection of the said telegram as aforesaid, its negligent and careless delay and the negligent and careless conduct of the defendant in delivering the said telegram to the wrong person . . . . the said H. W. Baker & Co., were prevented from realizing the amount which they would have obtained and the amount they were compelled to accept by reason of the said wrong and delay of the said defendant.

XII.

That the difference between the amount the said H. W. Baker & Co. would have received had the said defendant done its duty to the said H. W. Baker & Co., and the amount that the said H. W. Baker & Co. did receive by reason of the said wrong of the said defendant was the sum of six thousand nine hundred and nine and 26-100 dollars ($6,909.26), which said sum of six thousand nine hundred and nine and 26-100 dollars ($6,909.26) was wholly lost to the said H. W. Baker & Co., by the said wrongful act, carelessness, and negligence of the defendant in the manner hereinbefore stated.

XIII.

That the said H. W. Baker & Co. duly notified the said defendant of its said loss at the first and earliest opportunity, and duly demanded of the said defendant reimbursement to the said H. W. Baker & Co. of the said sum so lost through the negligence of the defendant; but the said defendant wholly refused in everywise to reimburse the loss of the said H. W. Baker & Co., or to pay the damage occasioned as aforesaid to the said H. W. Baker & Co., or any part thereof.

XIV.

That the special damage and expense to the said H. W. Baker & Co., occasioned by the wrong and carelessness and negligence of the defendant is the sum of two hundred and fifty-three and 34-100 dollars (253.34), and the whole of the said damage to the said H. W. Baker & Co. was at the said first day of March, A. D. 1892, and now is the sum of seven thousand one hundred and sixty-two and 60-100 dollars ($7,162.60).

XV.

That on the first day of November, 1892, said H. W. Baker & Co. duly transferred their business and accounts and choses in action, and all right, title, claim, and demand, both in law and in equity whatsoever, in its business and in the said claim against this defendant, to H. W. Baker, this plaintiff, who survives the partnership of

H. W. Baker & Co., being the said H. W. Baker of the firm of H. W. Baker & Co, heretofore named, and H. W. Baker is now the owner and holder in every wise of all the rights whatsoever under the said claim and of the said business.

XVI.

That this plaintiff has demanded payment of the said sum, and the defendant had wholly failed and refused to pay the same or any part thereof.

Wherefore plaintiff prays judgment against the defendant for the sum of seven thousand one hundred and sixty-two and 60-100 dollars, with interest, and costs and of legal disbursements.

STRATTON, LEWIS & GILMAN,
Attorneys for Plaintiff.

State of Washington, }
County of King. } ss.

H. W. Baker, being first duly sworn, upon his oath deposes and says: That he is the plaintiff named in the foregoing complaint, that he has read the same and knows the contents thereof, and that the same is true.

H. W. BAKER.

Subscribed and sworn to before me this 13th day of Febr'y, A. D. 1893.

JAS. HAMILTON LEWIS,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Uncertified copy of Comp. omitting parts stricken. Filed May 19, 1893. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Prepared by clerk by order of court.

In the United States Circuit Court, Northern Division, State of Washington.

H. W. BAKER,
Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to the amended complaint of the plaintiff therein:

I.

Denies that it has any knowledge or information sufficient to form a belief of any matter or thing alleged in paragraphs 1, 3, 9, 10, 11, 12 and 15 of said amended complaint.

II.

Denies that it has any knowledge or information sufficient to form a belief of any matter or thing set forth in said complaint not presumptively within the knowledge of this defendant, and as to any allegations therein contained of matters and things presumptively within the knowledge of this defendant, or so charged that the same appear so to be, this defendant denies each and every thereof; and denies that by anything set forth in said complaint, or otherwise, plaintiff has been damaged $7,162,60, or in any other sum or amount whatever.

Wherefore, defendant demands judgment against plaintiff for its costs herein most wrongfully sustained.

TURNER & McCUTCHEON,
Attorneys for Defendant.

State of Washington, }
County of King. } ss.

Edgar H. Brown, being first duly sworn, on oath says: That he is the manager of the defendant in the above entitled action at Seattle, in King county, Washington; that he has heard the foregoing answer read, knows the contents thereof and believes the same to be true.

EDGAR H. BROWN.

Subscribed and sworn to before me this 29th day of August, A. D. 1893.

J. B. MURPHY,
Notary Public, residing at Seattle, Washington.

We hereby admit service of the foregoing answer by copy, this 29th day of August, A. D. 1893.

STRATTON, LEWIS & GILMAN,
Attorneys for Plff.

[Endorsed]: Answer. Filed Aug. 29, 1893, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Trial.

Now on this 4th day of June, 1897, this cause came on regularly for trial, in open court, plaintiff being present by his attorneys, Messrs. Carr & Gilman, and defendant present by its attorneys, I. D. McCutcheon and A. F. Burleigh a jury being called come and answer to their names as follows: S. P. Connen, J. M. Izett, Augustus Griffin, M. McTeigh, Robert Knox, C. S. Merritt, Alex. Henderson, Charles Kash, J. A. Buchan, Charles Neff, B. R. Brierly and R. E. Pickerell, twelve good and lawful men duly empaneled and sworn to try the cause. All parties consenting thereto, the further trial of this cause is continued until the incoming of court at the hour of 9:30 o'clock to-morrow morning.

Record of day's trial, June 4, 1897.

[Title of Court and Couse.]

Trial (Continued).

Now the hour of 9:30 o'clock having arrived, the plaintiff being present by his counsel, Carr & Gilman, and the defendant being present by its counsel, I. D. McCutcheon and A. F. Burleigh, the jury being called, all answer to

their names, all being present in their box, this cause proceeds by the introduction of evidence and examination of witnesses on behalf of the plaintiff as well as on behalf of the defendant until the close thereof, at which time the further trial of this cause is continued by consent until the incoming of court at the hour of ten o'clock A. M. on Monday, the 7th day of June, 1897.

Record of day's trial, June 5, 1897.

[Title of Court and Cause.]

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being present by his counsel, Carr and Gilman, and the defendant being present by its counsel, I. D. McCutcheon and A. F. Burleigh, the jury being called, all answer to their names, all being present in their box, this cause proceeds by the argument to the jury of the respective counsel until the close thereof.

Whereupon the jury are duly charged by the court, and retire in charge of a sworn officer to deliberate.

And now on this same day the jury return into open court, all being present in their box, when through their foreman they present the following verdict: "We, the jury in the above entitled action, do find for the plaintiff, and assess his damages at the sum of thirty-two hundred and fifteen and 60-100 dollars ($3215.60). J. M. Izett, Foreman."

Whereupon the jury are duly discharged from further consideration of the cause.

Record days' trial, June, 7, 1897.

[Title of Court and Cause.]

Verdict.

We, the jury in the above entitled action, do find for the plaintiff, and assess his damages at the sum of thirty-two hundred and fifteen 60-100 ($3215.60).

J. M. IZETT,
Foreman.

[Endorsed]: Verdict. Filed June 7, 1897. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

[Title Court and Cause.]

Motion for New Trial.

Now comes the defendant, by I. D. McCutcheon and Burleigh & Piles, its attorneys, and moves the court to set aside the verdict of the jury heretofore rendered in this action and to grant a new trial of said action upon the following grounds, namely:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Error in theassessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict or other decision, and that it is against law.

IV.

Error in law occurring at the trial of said action and excepted to at the time by the defendant.

I. D. McCUTCHEON and BURLEIGH & PILES,
Attorneys for Defendant.

Received true copy of the enclosed motion this 8th day of June, 1897.

PRESTON, CARR & GILMAN,
Attorneys for Plff.

[Endorsed]: Motion. Filed June 8, 1897. A. Reeves Ayres, Clerk. By H. M. Walthew, Deputy.

[Title of Court and Cause.]

Order Denying Motion for New Trial.

Now on this 28th day of June, 1897, this cause having come on regularly for hearing upon defendant's motion for a new trial herein, and the court, after hearing argument of respective counsel upon said motion, and being now sufficiently advised in the premises, it is ordered that the sail motion be and the same is hereby denied.

To which ruling of the court in denying the said motion, the defendant, by its counsel, here and now excepts, and its exception is allowed.

Order denying motion for new trial, entered June 28, 1897.

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that, on the trial of the foregoing case, the following testimony was taken on behalf of plaintiff and defendant to maintain the issues respectively, and the following charge was given by the Court to the jury, and the following exceptions were then and there regularly taken:

This cause coming on regularly for hearing, before the Honorable C. H. Hanford, Judge, sitting with a jury duly empaneled and sworn, on this 4th day of June, A. D. 1897, at the hour of ten o'clock A. M.; the plaintiff being present in person and represented by E. M. Carr, Esq., and L. C. Gilman, Esq., of counsel for plaintiff, and the defendant being represented by I. D. McCutcheon, Esq., and A. F. Burleigh, Esq., of counsel for the defendant, whereupon the following testimony is given and proceedings are had:

—.

On application, Messrs. Preston, Carr & Gilman were substituted as attorneys of record for the plaintiff in place of Messrs. Stratton, Lewis & Gilman.

(The jury having been examined, duly empaneled, and sworn to try the case, the Court takes a recess until Saturday, June 5th, 1897, at 9:30 A. M.)

June 5th, 1897, 9:30 A. M.

HOWARD W. BAKER, a witness produced in his own behalf being first duly sworn, testified as follows:

Q. (By Mr. GILMAN).—Your name is H. W. Baker?

A. Yes, sir.

Q. Mr. Baker, of what place were you a citizen and where were you residing at the time of the commencement of this action?

A. Seattle, Washington.

Q. And where are you now residing?

A. In Chicago.

Q. Have you changed your residence to the city of Chicago or are you engaged there temporarily?

A. I am working there for a firm temporarily.

Q. In what business were you engaged in 1891?

A. Storage, shipping, and commission business.

Q. Were there others associated with you?

A. Yes, sir.

Q. And who were they?

A. William H. Wilson.

Q. And under what firm name did you do business?

A. H. W. Baker & Co.

Q. How long had you been engaged in that business prior to 1891?

A. Four or five years.

Q. Do you know the firm of B. Singer & Company, doing business at Sydney, Australia?

A. Yes, sir.

Q. What was their business?

A. They were consignees, brokers, general agents and merchants, and merchandise insurance agents.

Q. Did you, in the fall of 1891 make any business arrangement with the firm of B. Singer & Company, or did your firm make any such arrangement?

A. Yes, sir.

Q. What was that arrangement?

A. We arranged with them to handle, as consignees, our lumber business in Sydney, Australia, from the Sound.

Q. Pursuant to that arrangement, what did you do with reference to making a consignment of lumber?

A. We bought a cargo of lumber in Tacoma, and consigned it to B. Singer & Company for our account.

Q. By what ship was it sent?

A. The ship "W. H. Lincoln."

Q. And what was the amount of the cargo?

A. It was about one million two hundred and sixty thousand feet or one million two hundred and seventy thousand—about a million and a quarter.

Q. What kind of lumber?

A. It was what you would call merchantable lumber, some of it was dressed lumber, and some of it was lath.

Q. How was B. Singer & Company to sell this lumber when it was received there, or were they to sell it before its receipt?

A. That would depend on the condition of the market; whatever would suggest itself as to the best advantage.

Q. What arrangements, if any, were made to keep you advised as to the price at which a sale should be had?

A. They were to keep us advised by cable—receive instructions by cable.

Q. Did you, yourself, also keep a watch on the Australian markets, through the market reports?

A. Yes, sir.

Q. After the ship sailed, I will ask you what you learned in reference to the Australian market?

A. We learned just about the time she was sailing that there was some dullness being felt there, and shortly after she sailed, we learned from various market reports,

which were received in this country, as the result of cables, to other consignors in San Francisco, that the outlook there was not good, and we received a cable from Singer, I think about 10 days after the ship started, saying that there was considerable on the way there and that the outlook was not good, or something to that effect.

Q. Now on the 9th of October, did you receive a telegram over the ilnes of the Western Union Telegraph Company?

A. Yes, sir.

Q. I will ask you whether you had been doing business with the Western Union Telegraph Company during the time you had been in business in Seattle?

A. Yes, sir.

Q. How extensively?

A. We done business with them for 2 or 3 years, probably an average of from thirty to sixty dollars a month and sometimes a little more and sometimes a little less.

Q. And were the employes of the company acquainted with you and your place of business?

A. Yes, sir.

Q. Who was the manager of the Western Union Telegraph Company at that time?

A. Mr. Brown.

Q. Was he acquainted with you and your place of business? A. Yes, sir.

Q. On the morning of the 9th of October, did you receive a telegram from the Western Union office, and over the Western Union lines?

A. Yes, sir, I received a cablegram.

Q. I will ask you to look at that (showing document to witness) and state whether that is the cablegram you received? A. Yes, sir.

Cablegram identified by the witness, received in evidence without objection and marked "Plaintiff's Exhibit A," and read to the jury as follows:

Plaintiff's Exhibit "A."

"Sydney, October 1, 1891. Received at Seattle, Wash. 8:07 A. M. To Barker, Seattle. Offered four pounds thousand cif advise accept market dull no outlet."

Q. From whom did you receive the cablegram, Mr. Baker?

A. Do you mean who brought it to the office?

Q. Yes.

A. It was one of the messenger boys of the Western Union.

Q. Upon opening the cablegram, what did you ascertain? A. I saw it was eight or nine days old.

Q. What did you then do?

A. I rang up the Western Union Company's telegraph office and telephoned them and wanted to know how it happened.

Q. What answer did you receive?

A. I told them that we just received a cable which showed by the dates that it was in town eight or nine days, and wanted to know what the matter was, and they

said it came directed to Barker instead of Baker—they didn't say, instead of Baker, but it came directed Barker, and had been put in the desk of Abraham Barker of the Merchants' National Bank, and he had been away and they did not find out the error until he got back, and that was why it had been delayed eight or ten days, and then they wired to New York and found a mistake had been made and it should be Baker, and they brought it down to us at once. That was the next morning.

Q. After the conversation over the telephone, did anybody connected with the Western Union come to your office? A. Mr. Brown came down.

Q. What occurred between you and him?

A. He came down there that afternoon. Why he said he was sorry it happened, but I told him that I was also sorry it happened; that probably it made a great deal of difference with us. I told him that everything was going to pieces in the Australian market, and the chances was it might have lost us several thousand dollars. That I would not know until I could find out by communicating with them there. He said, as soon as they found out the mistake, they brought it right down, and he seemed to feel very badly over it, and so did I. I asked him if he knew where the mistake happened, and he said he didn't, that he had wired New York, on the night before, and they immediately wired back that it should be Baker, and I asked him to look into the matter and let me know again; that if we suffered any damage from it, that the Western Union Telegraph Company would have to pay for it.

Q. Did he subsequently have a conversation with you regarding the same matter?

A. He came down two or three days later. I don't remember just how soon it was—some time during the week— and offered to pay us the amount that that cablegram cost, and also the one that we sent to Sidney, saying that this had been delayed, and asking how things then stood, and he offered that as a settlement, but I would not take it. That was a matter probably of forty or fifty dollars and if we lost anything, it would be probably several thousand, and I told him then at that time that we would go ahead and do the best we could with it and hoped that there would not be any loss, and if there was, of course I would hold the Western Union Telegraph Company for it.

Q. Did he state anything in reference to the custom of telegraph companies or of his company in making settlements in matters of this kind?

A. He said when they made a mistake, it was always customary to rebate the cost of the telegram, on the theory that it was no use to the customer receiving them.

Q. Now, taking the telegram itself, Mr. Baker, will you explain to the jury the meaning of the term "c. i. f."?

A. c. i. f.—the word is "cif"—it is a term used as a cipher in maritime and foreign commercial matters, and means "cost, insurance, freight."

Q. And what is the meaning of a sale "c. i. f."?

A. A sale on those terms would be a sale at the price of the commodity upon which the sale was being figured at the point or port of destination, wherever it might be

shipped either by steam or vessel, and means the cost of the article at the port of departure at the invoice price; added to that, the marine insurance on it for the voyage, and added to that the freight from the port of clearance to the port to which it is consigned.

Q. That is paid by whom?

A. That is paid by the consignor in the case where the offer is made "cost insurance, and freight." Those three items are covered by the consignor.

Q. What items does the consignee in a sale of that kind, pay?

A. He pays no items of that character; he gets the cargo of goods, whatever they may be, at that price, which is clear to that time, what is called "Ex ship's tackle." The ship delivers it along side to the consignee, and the consignee, in addition to that, pays wharfage charges, if any, and handling, stevedoring, and stacking, etc. duty and all charges incidental to the handling, or entering into the port, of the goods in question.

Q. Do you know the difference between a sale "c. i. f," and a sale laid down in the yards at Sydney?

A. Well you mean in lumber?

Q. Yes in lumber?

A. It varies in different articles.

Q. In this kind of a cargo.

A. It varies there about two pounds to two and a quarter; two pounds, ten shillings and something.

Q. That is a sale in the yard would be that much more than a sale c. i. f.?

A. By a yard sale—they seldom sell cargo lots out of

the yard. Generally it is cargo lots and in large quantities, and I presume that is taken into consideration.

Q. How is a sale, c. i. f. affected when the cargo is still on the way?

A. It is affected by transfer of the bill of lading with the insurance policy attached and also the invoice receipted.

Q. I will ask you whether or not your bill of lading and insurance policy on this cargo had been transferred to Sidney? A. Yes, sir.

Q. And it was there at the time this cablegram was received? A. Yes, sir.

Q. Mr. Baker, if this cablegram had been received by you on the 1st day of October, what action would you have taken upon it?

A. We would have accepted it at once.

Q. And upon its acceptance, what would have been your instructions to Sydney and what would have been done in Sydney?

A. If we had accepted, we simply would have cabled "Offer accepted," and then in the usual course of matters of that kind, would have made the proper transfers, and remitted to us, and conclusion of the account.

Q. You would have transferred the bill of lading and the insurance policy to the purchaser?

A. Yes, sir.

Q. Now, upon the discovery of this delay by you, what did you do towards handling the cargo in Sydney?

A. I cabled to Singer that the message had been delayed, asking also either what was the condition of the

market, or what offer could be obtained at that time. I think that that cablegram, we sent on the afternoon of that same day—on the afternoon of the 9th.

Q. I will ask you if it was not on October the 9th, the same day that the cablegram was sent?

A. Yes, sir.

Q. I will ask you, if that (showing document to witness) is a copy of the telegram taken from your books?

A. Yes, sir—no, sir, this is not; this is one that we sent about a week afterwards, trying to get an offer.

Q. Is that the one (showing another paper to witness)?

A. That is the one.

Document identified by the witness received in evidence without objection and marked "Plaintiff's Exhibit B" and read to the jury as follows:

Plaintiff's Exhibit "B."

"October 9, 1891. Ritual, Sydney. Message delayed wire conditions and offerings to-day. Baker."

Q. This "Ritual" was the cable address of Singer & Company? A. Yes, sir.

Q. And afterwards, a week later, did you send another cablegram to them? (Showing document to witness.)

A. Yes, sir.

Q. Is that a copy?

A. That is the one.

Document identified by the witness received in evidence without objection andmarked "Plaintiff's Exhibit C" and read to the jury as follows:

Plaintiff's Exhibit "C."

"Oct. 16th. Ritual, Sydney. What condition market what offers. Rush this and charge H. W. B. & Co."

Q. That note at the end of that, which says, "Rush this and charge H. W. B. & Co.," was simply a memorandum from you to the office here?

A. Yes, sir, to let them know it was important and rush it.

Q. Did you succeed Mr. Baker in getting any satisfactory offers on the Sydney market for this lumber?

A. No, sir.

Q. Just state what you did from that time forward with reference to the lumber?

A. Well, we figured in the first place—we judged from cablegrams we then received from Singer and also from general market reports, that the lumber market there was in a condition of panic, which possibly would not last over sixty days or so, that is, with the prices at as low a stage as they were at that time.

Counsel for defendant objects to the witness stating what he thought instead of what he did.

Q. You state what you did Mr. Baker?

A. We waited until the arrival of the ship in Sydney and ordered the cargo discharged and handled by yard sales instead of cargo lot afloat.

Q. What efforts did you make to dispose of the cargo?

A. After arrival?

Q. Yes, and before?

A. Prior to arrival, we had made efforts through our consignees and agents there to secure what we call, "cargo offerings" for us, for the cargo of lumber, c. i. f, as that would rid us of any of the expense and further investment of handling it ashore, and it would be a little bit quicker, but we were unable to get an offer that was not at the lowest possible price and that we would consider properly advantageous, so that the cargo was landed and sold by people well experienced in the business there and to the best possible advantage, the matter was entirely wound up, and we received statement and account sales, in February of the following year. The vessel's discharge was not completed until about the early part of January. The lumber was sold off in small lots to various purchasers.

Q. You put the management over into proper hands?

A. Yes, sir.

Q. Whose hands?

A. The bank of New Zealand; they made advances for storage and wharfage and so on, for our account.

Q. What was the condition of the Australian market in the interim?

A. The market did not recover at all and did not for some time after that.

Q. And what was the amount that you finally realized from the sale of the lumber?

A. We got about $833—one hundred and some odd pounds.

Q. Was there any portion of the cargo injured in any way?

A. Yes, sir, there was about 16,000 feet of it destroyed by fire in Sydney, just as they were finishing the discharge of the vessel, after she had been there about a month, the residue of the cargo caught fire and destroyed the ship and about 16,000 feet of lumber and some lath.

Q. So that the total which you received from this shipment of lumber which you made was some eight hundred dollars? A. Yes, sir.

Q. Mr. Baker, I will ask you what steps you ever took with the telegraph company to ascertain where this mistake had been made and the cause of it other than what you have mentioned?

A. Well, I asked Mr. Brown two or three times subsequent to the time the error occurred, as to whether they found out just exactly where they made the mistake, but he was noncommittal after that—he would not say.

Counsel for defendant objects to the witness stating the declarations of Mr. Brown after the occurrence for the reason that the same is irrelevant, immaterial, and incompetent and not binding upon the company. Which objection is by the court overruled and an exception noted for defendant.

A. (Continuing.) I could not get any satisfaction out

of Mr. Brown, definite, to suit me, and I was in New York, during the following summer, that was the summer of 1892, and I called on the Western Union building up on Broadway and inquired where the cable department was and who had charge of it, and they told me Mr. O'Leary had charge of it, on the second floor and I went up and saw him.

Q. State what occurred between you and Mr. O'Leary?

A. I told him my name was Baker from Seattle and that we had had a telegram come through some time before in the fall from Sydney, a cablegram, and I wanted to use it for certain purposes in New York and I would like to have a copy of it, as I hadn't time to get one from Seattle to use at the time. He asked me the date of it and I told him. He started over to his files—over toward something that looked like files, and came back and asked me if I was Baker, the shipping merchant in Seattle. I told him I was. Well, he said that—

Counsel for defendant objects to the witness relating his conversation with Mr. O'Leary on the ground that the same is irrelvant, immaterial, and incompetent and no proper foundation has been laid. Which objection is by the court overruled and an exception noted for defendant.

A. (Continuing). He said the matter had been up and that they had some correspondence about it and that he now remembered which telegram it was, and he said he could not give me a copy, because it was against the rules of the telegraph company to give any copies of messages from the office intransmission, and I then told him

that that despatch, as he probably knew, had come directed "Barker," and as the result of the error, we had lost several thousand dollars; that I wanted to find out where the mistake had been made; I had been given to understand in Seattle at the time that it had been made in New York, and that that had afterwards been denied—not denied, not directly, but by implication—and I wanted to find out while I was there. If the mistake had not been made by the Western Union Telegraph Company or by any of their lines, we would drop the matter and if they hadn't done it, we wanted to find out who had, and it would avoid trouble and avoid a lawsuit, and he refused to give me the information.

Q. Was there any question raised by O'Leary as to your identity?

A. No, sir, I think I gave him my card. He had possibly seen our letterhead before, and it was quite like it.

Q. Now, what steps did you take towards making a claim against the Western Union Telegraph Company?

A. We had demand made on the Western Union Telegraph Company by our attorneys Hawley & Prouty—Mr. Prouty made the demand.

Counsel for defendant admits that some six or eight months after this occurrence, Messrs. Hawley & Prouty did write a letter to Mr. Fearsons, attorney of the company in New York.

A. (Continuing.) That letter to Mr. Fearsons was simply to know whether they would settle up or we would

sue. We didn't make the demand on the attorney of the company, we made demand on Mr. Brown.

Q. Now, do you recollect the time this claim was made on Mr. Brown, or about what time?

A. I don't exactly; my impression is that we made the demand for whatever might be the damage at the time this matter occurred, but the actual amount was not demanded, till after the return of all papers, which was in the spring of 1892, and my recollection is that Mr. Prouty made that demand personally after or just before he drew up the complaint, before filing.

Q. Do you recollect the amount of the claims which you made?

A. It was $7200 (examining statement), no $7,162.60.

Counsel for plaintiff offers in evidence letter of Mr. G. H. Fearsons to H. W. Prouty, Esq., received in response to plaintiff's demand; which letter is received in evidence without objection, marked "Plaintiff's Exhibit D" and read to the jury as follows:

Plaintiff's Exhibit "D."

"Law Department, Western Union Telegraph Company.
195 Broadway, New York, May 28th, 1892.

Henry W. Prouty, Esq., Attorney at Law, Seattle, Washington.

Dear Sir: The papers relating to the complaint of Messrs. H. W. Baker & Co., on account of alleged delay in delivery of a message to them from Sydney, October 1st, 1891, have been referred to me.

Investigation shows that the message, as received by the Western Union, was not addressed to "Baker," but to "Barker," and was therefore delivered to Mr. Barker, and it was only when he returned the message that we could report nondelivery to Sidney and obtain the correct address.

I beg to assure you that no error occurred on the Western Union lines, or on the lines of any cable company controlled or operated by it. I am advised that the error appears to have occurred on the lines of the Eastern Telegraph Company. I must therefore decline to entertain any claim in the matter.

Very truly yours,
(Signed) GEO. H. FEARSONS,
General Attorney."

Q. In addition to the loss which you suffered by not being able to accept this offer, what expenses were you put to in obtaining a new sale, cost of cablegrams, etc.?

A. $79 to one company, for one month and $140 or $150 I think.

Q. I will ask you to look at those figures and state if they are correct—whot is the last item there?

A. $174.25.

Q. Making a total of—

A. $253.34.

Q. Was that occasioned by this misdelivery of this telegram? A. Yes, sir.

Q. Did Mr. Wilson afterwards retire from this business? A. Yes, sir.

Q. Who succeeded to the business?

A. Why, nobody. I simply continued the business. Wilson retired.

Q. Everything was turned over and assigned to you?

A. No, we simply made an entry to his account on the books, closing it out into mine, and simply took the receipt. He retired from the business and his account was closed out, and I took the receipt, or the business took a receipt for what he drew to his credit of his personal account, and that was all there was about it.

Q. And that all was due the business of any kind was turned over to you?

A. Yes, sir, the business continued right along, and I was H. W. Baker & Co., after that.

Cross-Examination.

Q. (By Mr. BURLEIGH)—You say you consigned the ship of lumber to Singer & Company in September, 1891, at Sydney, Australia?

A. Yes, sir.

Q. What was the name of that ship?

A. W. H. Lincoln.

Q. How much lumber did you send over on it?

A. About twelve hundred thousand feet—one million two hundred and seventy thousand feet I think it figured.

Q. Did you advise them that you had sent the lumber?

A. Yes, sir.

Q. How did you do it?

A. We advised them by cable and also by letter inclosing the invoice, the Marine Insurance certificate and the bill of lading.

Q. Was this the first transaction you had with Sydney? A. Yes, sir.

Q. The first consignment you made?

A. Yes, sir.

Q. When you advised them by cable, what line did you use?

A. I don't recollect, but I think it was the Postal.

Q. That is the Postal Telegraph Company's line?

A. Yes, out of here.

Q. That is an opposition line to the Western Union, is it not?

A. Well, I don't know just how far they carry that sort of thing.

Q. You know, as a matter of fact, it is an opposition line?

A. I know it is a separate line so far as the United States is concerned.

Q. And you sent the advice of the consignment of this cargo of lumber over the Postal Telegraph Company's lines? A. That is my impression.

Q. Now, Mr. Baker, you aver in your complaint that this change of address in the telegram of "Baker" to "Barker" was made in the city of New York; as a matter of fact, you do not know whether it was made there or not, do you?

A. No, sir, I do not. I made that statement in the complaint from information, I got from Mr. Brown and from Mr. O'Leary.

Q. I say. you did not know whether it was made there or not?

A. I made it on the information I got from Mr. Brown.

Q. I asked you if you knew.

The COURT.—I want to say to you Mr. Baker that this is cross-examination and when you are asked a question, do not make any argument or explanation but answer the question. Your counsel will see that all the explanations go in before the jury at the proper time.

Q. (By Mr. BURLEIGH)—Now, as a matter of fact, you do not know where the mistake occurred, do you?

A. No, sir.

Q. You do not know where the change was made?

A. No.

Q. You say that this telegram was brought to you on the 9th day of October? A. Yes.

Q. And you sent a message of inquiry on the same day "Message delayed wire conditions and offerings to-day"?

A. Yes, sir.

Q. Did you get an answer to that?

A. No, sir.

Q. You didn't get any answer? A. No, sir.

Q. Was that sent by the Western Union or the Postal Telegraph Company's lines?

A. I could not say for sure, but I think probably by the Postal.

Q. As a matter of fact, all this correspondence was carried on by you over the Postal Telegraph Company's line, after the message of October 1st was delivered?

A. Yes. We didn't have any more—we didn't send any more.

Q. You didn't use the Western Union?

A. No, sir.

Q. On October 16th, you sent another message of inquiry, "What condition market. What offers" did you get any answer to that?

A. We got an answer to that, I think some few days afterwards.

Q. Didn't you get an answer on the 19th, advising you that you could get seventy-two shillings and six pence a thousand for the cargo of lumber?

A. No, we got a cable a few days after that advising us that we could get seventy-two net.

Q. Was not that the message you got (showing)?

A. Yes, sir.

Q. Now just explain to the jury if you please what this telegram means, as to the price, "Market demoralize offered seventy-two shillings net cif reply immediate."

A. That would mean that the offer was seventy-two shillings, we to pay freight and insurance out of that.

Q. Then, this was just eight shillings less than the other offer? A. Yes.

Q. If you had accepted this offer, what would you loss have been. Just figure that out for the jury, as accurately as possible.

A. It is eight shilling per thousand feet, and there was twelve hundred thousand feet—twelve hundred and seventy-two thousand feet—

Q. If you had accepted it, what would your loss have been? A. It is $2468.

Q. $2468.

A. That is on the basis of eight shillings to the thousand.

Q. Eight shillings loss?

A. You are to understand that is not what we lost on the cargo, that is the difference between four pounds and seventy-two shillings.

Here the telegram just identified by the witness is introduced in evidence as a part of the cross-examination, maked "Defendant's Exhibit No. 1" and reads as follows:

Defendant's Exhibit No. 1.

"Sydney, 10-19, 1891. Received at Seattle, Wash. 8:04 A. M. To Baker, Seattle. Market demoralize offered seventy-two shillings net cif reply immediate."

Q. As a matter of fact, you did not accept that offer?

A. No, sir.

Q. Notwithstanding the market was falling?

A. No, sir.

Q. How long did you keep that cargo of lumber before you authorized a sale?

A. Where, in Sidney?

Q. Yes?

A. We didn't keep it there at all.

Q. Where did you keep it?

A. Before we authorized a sale.

Q. When did you authorize a sale of it?

A. We authorized the sale after the arrival of the cargo.

Q. When did it get there?

A. It got there I think in the early part of December. I am not making positive answers.

Q. I want to get at it, about?

A. The actual date—we had a cablegram for it—I think it is the early part of December.

Q. If you have that cablegram, I would like to fix that date?

A. I don't know whether we have got it or not.

November 20th.

Mr. GILMAN.—A. Yes, sir, it was the latter part of November.

Q. (By Mr. BURLEIGH)—Is this right (showing paper to witness)?

A. That is my recollection, we afterwards found out she arrived on the day before.

Q. You could just as well have sold that cargo of lumber any time before the ship arrived, on any other suggestion made by cable, as on the message of October the 1st —the cargo didn't have to be there in order to sell?

A. No, sir.

Q. You could have sold it at any time?

A. Well, we could not.

Q. Why not?

A. When you have got a panicky market in the lumber business you can't get cargo offerings every day. We

got one that was a loss in eight days, a loss in thirteen days, of about twenty-six or seven hundred dollars, and the panic there, and panics don't as a rule last over sixty days.

Q. You knew the market was going to pieces?

A. We knew it had gone.

Q. Didn't it keep going to pieces?

A. No, sir, it was pretty close to bottom then?

Q. Didn't it keep getting—

A. —Subsequent results—

Q. Didn't it keep going to pieces?

A. Not much more.

Q. Did you get more than seventy-two shillings for this lumber? A. No, sir.

Q. Then it kept going down didn't it?

A. It went down to some extent. We sold it in an entirely different way.

Q. You sold it by auction—you auctioned it off?

A. Not all of it.

Q. Most of it?

A. Some of it in Sidney.

Q. Some of it burned up?

A. About sixteen thousand feet.

Q. You had a fire in the ship?

A. The ship burned up.

Q. What did you get for it finally by the thousand?

A. My recollection is it was about five pounds.

Q. Five pounds a thousand?

A. Yes, sir.

Q. Then you got a pound more than you were offered on the 1st of October.

A. Gross, yes, sir.

Q. I mean net, in the same way this offer came?

A. No, sir, net we only got about two and three-quarter pounds. By "net" I mean bringing it down to the "c. i. f." basis, on which that offer was made.

Q. You got two and three-quarter pounds you say, that would be about two pounds and fifteen shillings?

A. I never figured it up exactly.

Q. And when did you sell it?

A. We sold it during the month of January and part of February as called for—when there was demand in the market.

Q. What date?

A. I say we sold it during the months of January and February when there was demand.

Q. Then you held it all that time before it was sold?

A. I want to correct that statement; we sold part of it while the vessel was being discharged; as it would be landed and there was an opportunity to make a sale it would be sold.

Q. The market finally got so bad that you could not sell it except by piecemeal?

A. Well, we could not do that prior to the arrival of the ship. We sold it that way as the market was in bad shape and nobody would make cargo offerings. There was other vessels there and we sold it off in smaller lots and got a little better price.

Q. This offer of seventy-two shillings made on the 19th of October was a cargo offering?

A. That was a cargo offering.

Q. On the bill of lading just the same as the offer of October 1st. A. Yes, sir.

Q. That you declined? A. Yes, sir.

Q. Or did you just not say anything about it, which?

A. No. We declined that.

Q. When was it that you made this visit to Mr. M. J. O'Leary in New York City to enquire about this telegram?

A. It was on the 13th of June, 1892.

Q. Did you receive this letter of Mr. Fearsons' that has been offered in evidence before you went there?

A. I don't remember whether I had seen the letter or not. I never received it.

Q. It was sent to your attorney, and had you not seen it before you went east?

A. I don't remember possibly I had.

Q. Had you not been advised at the time you made your visit to Mr. O'Leary that the Western Union Telegraph Company claimed that this error had occurred before the message was delivered to them at Penzance?

A. No, sir.

Q. When did you go east?

A. I don't remember just when I went. I stopped a week in Chicago on my way and I had been there a day or two and I went up to see Mr. O'Leary, in New York. I left here in the later part of May sometime.

Redirect Examination.

Q. (By Mr. GILMAN)—You state that you alleged in your complaint that the mistake was made in New York and you have testified that you do not know where the mistake in the telegram was made; now state the reason you had for alleging that it occurred in New York?

Counsel for defendant objects as not proper redirect examination. Which objection was by the Court overruled and an exception noted for defendant.

A. When the complaint was signed, I signed it believing the mistake had been made in New York from the statement of Mr. Brown and also the girl that answered the telephone when I rang up about the message on morning it was delivered to me, and of course, that was strengthened in my mind by Mr. O'Leary, although Mr. O'Leary did not state that the mistake was made in New York.

Q. You mean that Mr. O'Leary's conduct strengthened your belief in that matter?

A. Yes, sir.

Q. In reference to this offer of seventy two shillings, state the reasons you did not accept that, Mr. Baker?

Counsel for defendant objects as not proper rebuttal testimony. Which objection is by the court overruled and an exception noted for defendant.

A. The reason we did not accept that there was a loss between that and the other offer we got of twenty-five hundred dollars in a few days; it showed a panicky state of the market, and there was no reason that we should

consider that a panic will last any great length of time. We had about forty or possibly sixty days yet to elapse prior to the arrival of the vessel during which time there would be no charge against us for storage and handling or anything of that kind and we thought it very safe to take chances on the market getting in better shape by the arrival of the vessel than it was at that time. That was during the time of the Australian panic and the building associations failing there and it looked like a clear panic that would recover at least to some extent, and we felt it our duty not to close it up just to get rid of it, but to do the best we could.

Q. Did you take any advice as to what you should do in reference to the matter?

A. Yes, sir. We took advice of different kinds. I consulted with some lumbermen on the Sound here; I telegraphed over to the St. Paul & Tacoma Lumber Company asking what they thought of the situation and they said it was bad but they didn't think it would be so bad in sixty days.

Q. After receiving that information you used your best judgment in not making the sale.

A. Yes.

Q. Did you take legal advice as to your duty towards the Western Union Telegraph Company?

A. Yes, sir.

Q. What was the result?

A. I asked our attorneys Hawley & Prouty, and they told us it was our duty to handle the matter just the same as if it was our own money that we had lost and were

losing again, and we would have to guard it properly and use our best judgment and keep the loss as small as possible.

Recross-Examination.

Q. (By Mr. BURLEIGH)—You acted then on your own judgment and at your own risk, did you in selling this lumber?

A. We acted on our own judgment. As to acting on our own risk, I don't exactly understand what you mean by that.

Q. Well, you risked this matter of loss on your judgment about selling the lumber didn't you?

A. Yes, sir.

Q. That is what I thought?

A. We had promised Mr. Brown to do that.

Q. You had promised Mr. Brown what?

A. I don't say we had promised, but we had stated to him that we would handle the matter and hoped that there would be no loss; but handle it in the best way possible, but if there was we would hold the company for it.

Q. You told Mr. Brown you would hold the company?

A. Yes.

Q. He didn't advise you how to handle it, did he?

A. No, sir.

Q. He didn't offer any suggestions as to that?

A. No, sir.

At this time counsel for plaintiff offers in evidence the deposition of Bela Singer, which is read to the jury as follows:

[Caption.]

Deposition of Bela Singer.

Q. What is your name, what is your business, how long have you been in such business?

A. My name is Bela Singer—my business is a merchant, and have been in business in Sydney for ten years.

Q. Did you know H. W. Baker & Co., of Seattle, Washington, if so, when did you know of them, and state, if in the month of October, 1891, your firm had any dealings with H. W. Baker & Co., concerning the ship "W. H. Lincoln" and a cargo of lumber?

A. I know the firm of H. W. Baker & Co. I knew them first in 1891. In the month of October, 1891, I had dealings with them concerning the ship "W. H. Lincoln" and the cargo of lumber.

Q. Please state if your house knew why the ship "Lincoln" was consigned to your house, if it was consigned by the said H. W. Baker & Co.? What was the cargo of the ship Lincoln, what kind of lumber was it, as known in the market, if it was lumber?

A. The cargo of the ship W. H. Lincoln was consigned by H. W. Baker & Co., to my house, and this was done on my personal advice to H. W. Baker & Co., while I was on a visit to America. The cargo was lumber and known in the market as Oregon lumber.

Q. Did you know when the said ship Lincoln started, if so, when were you advised that said ship Lincoln was consigned to you or your firm, either as buyers or brokers?

A. I received advice in New York from H. W. Baker & Co. early in the month of September, stating that the Lincoln had sailed for Sydney, and that they had advised my Sydney house. She was consigned to us as brokers.

Q. Did you or your firm in your behalf or any member or manager (if so who), of your knowledge, send a telegram or cablegram to H. W. Baker & Co., Seattle on October 1st, 1891, concerning the said cargo of the said ship Lincoln, or her lumber, if so, what was the telegram?

A. I knew nothing about any cablegram having been sent to H. W. Baker & Co., on October 1st, 1891, concerning the cargo of the ship W. H. Lincoln, until the 8th October, when I received a cable from my manager in Sydney stating that he had received no reply to the message of October 1st. I then telegraphed to H. W. Baker & Co., from New York, asking them why they had not answered and advising them to accept the offer.

Q. If you say it was addressed "Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet Singer," please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm, if you say you did get an answer—state when it was and what was the answer?

A. I do not of my own knowledge know how the cablegram was addressed. If it was in the words "offered four pounds thousand cif advise accept market dull no outlet,"

it would mean that an offer had been made for the cargo at 4 pounds per thousand feet, cost, insurance and freight paid by the consignor and advising Baker & Co. to accept as the market was dull and there was no sale for lumber. I do not of my own knowledge know whether any answer was received to this cablegram .

Q. Referring especially to the name and address of the telegram or cablegram, October 1st, 1891, sent by you to Baker & Co. please state especially how was the telegram addressed, especially as to the words "Baker" or "Barker", if you say "Baker", over what lines did you send, and did you pay for its transmission?

A. I do not know of my own knowledge how this cable gram was addressed, or over what lines it was sent, or what was paid for its transmission.

Q. If answer had come from Baker accepting offer, as contained in your cablegram of October 1st, 1891, how much money gross would have been realized from the cargo of W. H. Lincoln, how much money net would have been subject to draft of H. W. Baker & Co. or their order, issuing from cargo of W. S. Lincoln?

A. If the offer, as contained in cablegram of October 1st, 1891, had been accepted, the cargo would have realized about six thousand pounds gross, and there would have been about two hundred pounds net over and above draft, and all expenses of commission freight &c. subject to the order of Baker & Co.

Q. To whom would the cargo of lumber have been disposed or sold, if acceptance of terms proposed in cablegram of October 1st, 1891, had arrived duly, or had been

made, what was the reasonable and ordinary price of such lumber and cargo of lumber as contained on ship W. H. Lincoln, what price would have been reasonably obtained according to the marketable demand for the said cargo of lumber, and who would have purchased the same, or to whom would the same have been sold by you?

A. The cargo of lumber would have been sold to Messrs. Clifford, Moore & Co., of Sydney, timber merchants, if terms proposed in cablegram of October 1st, 1891, had been accepted; of my own knowledge, I do not know what was the reasonable and ordinary price of such lumber as contained in the ship W. H. Lincoln in the month of October, 1891, as I was absent in America at the time. This also applies to the other questions contained in this interrogatory.

Q. What kind of lumber was in the ship W. H. Lincoln, at the time it was consigned to you, and at the time it reached you, what was the reasonable market price for such lumber in the market of Sydney on October 1st, 1891? What was the condition of the market after the 1st, continuing during October, and especially up to and on the 9th of October, 1891, and what was the condition of the market from the 9th of October to the 16th of October, 1891? Please state as to what difference there was from the demand and market, between the said dates from October 1st, 1891, continuing to October 16th, 1891? Please state if any efforts were made by you to dispose of the cargo of the ship "Lincoln" after October 1st, and if so, state whether these efforts were diligent and reasonable or what they were as to diligence?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. If the cargo was eventually disposed of. Please state for what, when and to whom, simply giving amounts and names and in this question I inform you, you must add nothing more than the literal answer to the question, as your opinions of the reason are not material and not admissible at this time (nor of any collateral incidents affecting you only).

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. What would have been the difference in gross amount realized if the cargo sold according to your telegram October 1st, 1891, and the amount in gross realized at the time the said cargo was disposed of, what would have been the difference net from your place to Mr. Baker, or due to his draft or order from you should the sale of the cargo been made in accord with your telegram of October 1st, 1891, instead of the sale at the time it was made?

A. After an inspection of Messrs. Frazer & Co.'s account sales marked Exhibit "C," the difference in gross amount would have been nine hundred pounds in Baker & Co.'s favor. The difference in the net amount between Fraser & Co's account sales and the amount which would have been realized if sold according to our cable of October 1st, 1891, would have been about seventeen hundred pounds.

Q. On October 9th, 1891, please state if you received a telegram from Baker, concerning the cargo, or concern-

ing your telegram of October 1st, 1891; if so, have you that telegram, what was it, will you attach a copy of it here to your answer, did you receive another telegram from Baker concerning the said ship Lincoln or your telegram of October 1st, 1891, addressed to you by your cable name, if so what was that telegram, and would you attach a copy of it to your answer?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. Please state, referring to your telegram of October 1st, 1891, how the address was spelled and how the same was addressed here to Seattle. Please state if previous to the said telegram of October 1st, 1891, you had sent other telegrams or cablegrams to Baker & Co., to Seattle upon the same subject of the said ship Lincoln and how they were addressed? State whether the word "Baker," Seattle, was your usual and customary mode of address to Baker & Co., Seattle? If so, please state if the said telegrams from your house were sent from Sydney over the same telegraphic line, what was the name of the cable used?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. Please state generally any advantage you know or benefit which would have enured or followed directly as a course of business to Mr. Baker or Baker & Co. if acceptance had been made of offer contained in your telegram of October 1st, 1891, and the cargo sold accordingly?

A. A great benefit would have resulted to Baker & Co. if the offer had been accepted as contained in cablegram of October 1st, 1891 and the cargo sold accordingly. There would have been very little loss to them, and they would have worked up a trade in this market. This was their first venture and they lost the benefit of the market through this sale not having been carried out.

Cross-Interrogatories.

Q. How many cable telegraph lines connect Sydney with other parts of the world?

A. I do not know.

Q. Over what telegraph cable line was the cablegram sent which is referred to in plaintiff's sixth interrogatory. If you personally sent the original of that despatch and now have the same or can obtain it identify it, append it hereto and make it a part of your deposition.

A. In the ordinary course of transmission, the cablegram which is referred to in the plaintiff's sixth interrogatory would have been sent over the Electric Telegraph Line of the Government of New South Wales. All cablegrams are transmitted by them, and there are no private cable companies in this colony. I did not personally send the original of that despatch, and the original cannot now be obtained, as in the ordinary course of business with the Electric Telegraph Department the original has been destroyed. All original cablegrams are destroyed by the department after a lapse of eighteen months. I have however obtained from the New South Wales Electric Telegraph Department a certified copy of the said cable-

gram which is appended hereto and marked with the letter "A."

(Signed) B. SINGER.

(Duly attested.)

Exhibit "A."

"Transmitted Form.

New South Wales Post and Telegraph Colonial and Intercolonial lines.

Office Stamp. Telegram to Seattle Station,

Sent at h. m. Addressed to Baker.

Reference No.

No. of words 13.

Amount.

(Forwarded subject to the printed regulations of the Department, which may be seen at any Post and Telegraph Office in New South Wales.)

Offered four pounds thousand cif advise accept market dull no outlet.

Do not transmit.

Date 1st Octr. 91. (Signed) B. Singer & Co.

Time 2 h. 55 p m. Address 85 Clarence St."

Indorsed on face: "Ernest W. Perkins, Notary Public. B. Singer."

Indorsed with stamp: "Postal and Tel Dep. Sydney, N. S. W., 1 Ap. 95."

Indorsed on back: "Certified copy, P. B. Warder, Secretary, Telegraph Service 1. 4. 95."

At this time, counsel for plaintiff offers in evidence the deposition of Rudolph Hamburger, which is read to the jury as follows:

[Caption.]

Deposition of Rudolph Hamburger.

Q. What is your name, what is your business, how long have you been in such business. What relation do you bear to B. Singer & Co.?

A. My name is Rudolph Hamburger. I am manager for B. Singer & Co. and have been in that position for about seven years.

Q. Did you know of H. W. Baker & Co. of Seattle, Washington, if so, when did you know of them and state if in month of October, 1891, your firm had any dealings with H. W. Baker & Co., concerning the ship W. H. Lincoln, and a cargo of lumber?

A. I knew of H. W. Baker & Co. of Seattle, Washington in the month of September, 1891. The ship W. H. Lincoln was consigned by H. W. Baker & Co. to the firm of B. Singer & Co. with a cargo of lumber.

Q. Please state if your house knew why the ship Lincoln was consigned to your house, if it was consigned by the said H. W .Baker & Co.? What was the cargo of the ship Lincoln, what kind of lumber was it, as known in the market, if it was lumber?

A. The ship W. H. Lincoln had been consigned to our house by the said H. W. Baker & Co. through the personal representations of Mr. Singer. The cargo consisted of

lumber and was known in the market as Oregon lumber.

Q. Did you know when the said ship Lincoln started, if so, when were you advised that said ship Lincoln was consigned to you or your firm, either as buyers or brokers?

A. The firm was advised by cable on the 7th of September of the dispatch of the Lincoln to our firm as brokers.

Q. Did you or your firm in your behalf, or any member or manager (if so, who?), of your knowledge, send a telegram or cablegram to H. W. Baker & Co., Seattle, on October 1st, 1891, concerning the said cargo of the said ship Lincoln, or her lumber, if so, what was that telegram?

A. I, as manager for the firm, sent a cable on the 1st October, 1891, to H. W. Baker & Co., in the words following: "Baker, Seattle. Offered four pounds thousand cif advise accept market dull no outlet." The signature "B. Singer & Co.," was not transmitted.

Q. If you say it was addressed Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet, Singer," please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm, if you say you did get any answer, state when it was and what was the answer.

A. The cablegram was meant to convey that we had received an offer of four pounds per thousand feet cost, insurance and freight paid by consignor, and advising Baker & Co. to accept, as the market was dull and there was no sale for lumber. I did not get any answer to such cablegram nor any member of our firm or anyone else.

Q. Referring especially to the name and address of the telegram or cablegram October 1st, 1891, sent by you to Baker & Co., please state especially how was the telegram addressed, especially as to words "Baker" or "Barker," if you say "Baker" over what lines did you send and did you pay for its transmission?

A. The cablegram was addressed to "Baker," Seattle, and not "Barker." All cablegrams are dispatched over the lines of the government of New South Wales. I paid for the transmission of the cablegram the sum of three pounds, thirteen shillings and eight pence and obtained a receipt for the same, which receipt is appended hereto and marked with the letter "B."

Q. If answer had come from Baker accepting offer as contained in your cablegram of October 1st, 1891, how much money gross would have been realized from cargo of W. H. Lincoln; how much money net would have been subject to draft of H. W. Baker & Co. or their order, issuing from cargo of W. H. Lincoln?

A. About six thousand pounds gross would have been realized from the cargo, and there would have been about two hundred pounds net over and above the draft and all expenses of commission, freight, etc., subject to the order of Baker & Co.

Q. To whom would the cargo of lumber have been disposed or sold if acceptance of terms proposed in cablegram of Octoer 1st, 1891, had arrived duly or had been made, what was the reasonable and ordinary price of such lumber and cargo of lumber, as contained in the ship W. H. Lincoln; what price would have been reasonably

obtained, according to the marketable demand for the said cargo of lumber, and who would have purchased the same, or to whom would the same have been sold by you?

A. The cargo would have been disposed of to Messrs. Clifford, Moore & Co., of Sydney, timber merchants. The reasonable and ordinary price of such lumber as contained in the ship "W. H. Lincoln" was from three pounds to three pounds ten per thousand feet cif. The reason why the offer of eight shillings had been made to us for this cargo by Clifford, Moore & Co. was that they had to supply a contract, and they had not sufficient of their own cargoes coming forward. We could not get any satisfactory offer for this cargo, although vigorous endeavors were made to dispose of the same.

Q. What kind of lumber was in the ship W. H. Lincoln at the time it was consigned to you and at the time it reached you; what was the reasonable market price for such lumber in the market at Sydney, on October 1st, 1891? What was the condition of the market after the first continuing during October ,and especially up to and including the 9th of October, 1891, and what was the condition of the market from the 9th of October to the 16th of October, 1891? Please state as to what difference there was from the demand and market between said dates from October 1st, 1891, continuing to October 16th, 1891? Please state if any efforts were made by you to dispose of the cargo of the ship "Lincoln" after October 1st, and if so, state whether those efforts were diligent and reasonable or what they were as to diligence.

A. The lumber was Oregon pine lumber and the rea-

sonable market price for such lumber in the market at Sydney on October 1st, 1891, was three pounds to three pounds ten per thousand feet cif. The market was declining from the 1st of October up to the 9th of October, and throughout the whole of the rest of the month of October, and practically throughout the whole of the rest of the year. Between 1st October, 1891, up to October 16th, 1891, there was no demand for lumber of any kind, and the market was overstocked. We made all possible efforts to dispose of the cargo of the W. H. Lincoln after October 1st, and up to the 16th of October, but without success. On the 19th October, we received an offer from Clifford, Moore & Co. of 76.6 per thousand feet, of which we advised Baker & Co., but they would not accept.

Q. If the cargo was eventually disposed of, please state for what, when, and to whom, simply giving amounts and names, and in this question, I inform you, you must add nothing more than the literal answer to the question, as your opinions of the reason are not material and not admissible at this time (nor of any collateral incidents affecting you only).

A. I know that the cargo was eventually disposed of, but I do not know for what amount or who the persons were who became the purchasers.

Q. What would have been the difference in gross amount realized if the cargo sold according to your telegram of October 1st, 1891, and the amount in gross realized at the time the said cargo was disposed of; what would be the difference net from your place to Mr. Baker, or due to his draft or order from you should the sale

of the cargo been made in accord with your telegram of October 1st, 1891, instead of the sale at the time it was made?

A. After an inspection of Fraser & Co.'s account sales marked Exhibit "C," the difference in gross amount would have been 9 hundred pounds in Baker & Co's favor. The difference in the net amount between Fraser & Co.'s account sales and the amount which would have been realized if sold according to our cable of October 1st, 1891, would have been fully seventeen hundred pounds.

Q. On October 9th, 1891, please state if you received a telegram from Baker concerning the cargo or concerning your telegram of October 1st, 1891; if so, have you that telegram; what was it; will you attach a copy of it here to your answer; did you receive another telegram from Baker concerning the said ship Lincoln, or your telegram of October 1st, 1891, addressed to you by your cable name, if so, what was that telegram, and would you attach a copy of it to your answer?

A. I received a cablegram, dated 9th October, 1891, on 10th October, in the words following: "Message delayed, wire conditions and offerings today." I have not that cablegram now, and am therefore unable to attach a copy of it to this answer. On the 17th of October, 1891, I received another cablegram from Baker in the words following: "What conditions market; what offers"? I have not that telegram now, and am therefore unable to attach a copy of it to this answer.

Q. Please state, referring to your telegram of October 1st, 1891, how the address was spelled and how the same

was addressed here to Seattle. Please state if previous to the said telegram of October 1st, 1891, you had sent other telegrams or cablegrams to Baker & Co., to Seattle, upon the same subject of the said ship Lincoln and how they were addressed? State whether the word "Baker," Seattle, was your usual and customary mode of address to Baker & Co., Seattle? If so, please state if the said telegrams from your house were sent from Sydney over the same telegraphic lines; what was the name of the cable used?

A. The cablegram of October 1st, 1891, was addressed to "Baker, Seattle." A copy of the said telegram, as certified by Mr. P. B. Walker, the secretary of the Telegraph Service of the government of New South Wales is appended to the depositions of Mr. Bela Singer and marked with the letter "A." On the 18th September, 1891, I sent a telegram to H. W. Baker & Co., addressed in the same way. That was the only one prior to that of the 1st of October. We always addressed Baker & Co., Seattle, as "Baker, Seattle." I am unable to state what telegraphic lines these cables were sent over. They were sent in the usual way through the government of New South Wales, who receive and dispatch all cablegrams. There are no private cable companies in New South Wales.

Q. Please state generally any advantage you know or benefit which would have inured or followed directly as a course of business to Mr. Baker or Baker & Co., if acceptance had been made of offer contained in your telegram of October 1st, 1891, and the cargo sold accordingly?

A. A great benefit would have resulted to Baker & Co. if the offer had been accepted, as contained in cablegram of October 1st, 1891, and the cargo sold accordingly. There would have been very little loss to them and they would have worked up a trade in this market. This was their first venture and they lost the benefit of the market through the sale not having been carried out.

Cross Interrogatories.

Q. How many cable telegraph lines connect Sydney with the other parts of the world?

A. I do not know.

Q. Over what telegraph cable line was the cablegram sent which is referred to in plaintiff's sixth interrogatory? If you personally sent the original of that dispatch and now have the same or can obtain it, identify it, append it hereto and make it a part of your deposition?

A. In the ordinary course of transmission, the cablegram which is referred to in plaintiff's sixth interrogatory would have been sent over the Electric Telegraph Lines of the government of New South Wales. All cablegrams are transmitted by them and there are no private cable companies in New South Wales. The said cablegram was dispatched by me, and a certified copy of the said cablegram is appended to the depositions of Mr. Bela Singer and marked with the letter "A."

(Signed) R. HAMBURGER.

(Duly attested.)

Exhibit "B."

"Electric Telegraph Department."

Chief Office, Sydney.

Received from B. Singer & Co., the sum of three pounds, thirteen shillings and eight pence, cablegram of thirteen words to Seattle. S. W. Milne, Receiving Clerk.

R. HAMBURGER."

£3, 13.8.

Indorsed on face: "ERNEST W. PERKINS,

Notary Public."

Stamped on face:

"Elec. Tel. Dept. 1 Oct., '91. Sydney, N. S. W."

At this time counsel for plaintiff offers in evidence the deposition of Albert Elkington, which is read to the jury as follows:

[Caption.]

Deposition of Albert Elkington.

Q. What is your name? Where do you reside? Do you know the firm of B. Singer & Co.? Did you know the ship W. H. Lincoln? Did you know her cargo in October, 1891, and if so, simply answer yes, stating the date (how you came to know, etc., you cannot here state; it is immaterial)?

A. My name is Albert Elkington. I reside at Wharf Road, Snails Bay, Balmain, and my business address is City Mart, 359 George Street, Sydney, and I am the manager of the firm of Fraser & Co. I know the firm of B. Singer & Co. I knew the ship W. H. Lincoln and also her cargo in October, 1891, after arrival from the port of Tacoma, in Washington Territory.

Q. Did you know what was the usual and ordinary and reasonable market price for lumber such as comprised the cargo of the ship W. H. Lincoln on October 1st, 1891; if so, what was it per thousand on October 9th, 1891, what was it per thousand on October 16th, 1891; if you know what it was per thousand?

A. I know what was the usual and ordinary market price for lumber such as comprised the cargo of the ship "W. H. Lincoln" on October 1st, 1891. Throughout the month of October, 1891, lumber of the description comprised in this cargo was worth five pounds five shillings per thousand feet duty paid, average value. That was about the price throughout the whole of the month of October, 1891.

Q. If you know when the cargo was sold, simply state yes, and the date, and if you are the person who sold it, please state what was the amount, if the cargo only, that is, what was the amount the cargo brought separate from other things; is that amount gross?

A. The cargo was sold on various dates between the months of November, 1891, and February, 1892. I was the salesman and the total gross amount realized for the sale of the cargo was fifteen hundred forty-seven pounds,

three, three, as shown by the copy account sales appended hereto and marked with the letter "C."

Q. What is the business of Messrs. Fraser & Co., of which you are manager; please give the figures required herein with such accuracy as your judgment will permit, actual figures are not required in these answers?

A. The business of Messrs. Fraser & Co., of which I am manager and salesman, is that of mercantile auctioneers, and it was in the ordinary course of their business that this sale was carried out.

(Signed) A. ELKINGTON.

(Duly attested.)

Exhibit "C."

Sydney, ——, 18—

Account sales of timber sold by Fraser & Co. at auction by order and for account of the Bank of New Zealand.

Ex. W. H Lincoln.

1892		Summary: Gross.			Charges.			Net.		
Febry 2	192 Bdls laths, badly burnt	n 6				7	2	5	12	10
"	Lumber, badly burnt	66			3	19	2	62		10
"	do and laths handled prior to fire	3885	9	9	247	13	7	3637	16	2
"	Lumber and laths handled after the fire	1189	13	6	78	6	7	1111	6	11
		5147	3	3	330	6	6	4816	16	9
	Net proceeds as above							4816	16	9
Less disbursements as under										
Cash paid for freight, incl. 2 days' demurrage		3296	6	6						
Cash paid for duty		838	11	8						
" " " wharfage		161	5	3						
" " " landing, stackage, delivering and watching, per I. A Curtis' account		310	9							
Cash paid for fire insurance		5	11	3						
" " " survey fees		5	5							
" " " consul's fees		2	2							
" " " attendance at surveys and general agency		15	15					4635	5	8
Net amount realized after paying all charges								£ 181	11	1

ERNEST W. PERKINS,
Notary Public.

[Signed] A. ELKINGTON.

H. W. BAKER, recalled in his own behalf, testified as follows:

By Mr. GILMAN.—Q. In the testimony of Mr. Hamburger and Mr. Singer it appears if you had made that sale of four pounds a thousand "c. i. f.," that you would have realized two hundred pounds net over and above the amount of the draft. What was the amount of the draft?

A. Seventy-two or three hundred dollars.

Q. Also in the deposition of Mr. Hamburger it appears that he sent you a cablegram on the 18th of September. Have you been able to find that cablegram?

A. No, sir.

Q. Have you made search for it?

A. I have not this time. I could not find it at the former trial.

Q. Do you recollect what line it came over?

A. It came over the Western Union Telegraph Company. All our cables did from there.

Q. Can you give substantially the language of it?

A. He told us in that cable that the market was depressed and, I think, said that there was considerable on the way—he gave us to understand that.

Q. I will ask you if this was the language: "Lumber market depressed. Too many shipments coming"?

A. Yes, sir.

Q. How was that addressed to you?

A. That was addressed "Baker, Seattle."

Cross-Examination.

By Mr. BURLEIGH.—Q. Mr. Baker, you said in your testimony a while age something about addressing your telegrams to "Ritual," Sydney. What did "Ritual" mean?

A. Ritual is B. Singer & Co.

Q. Explain to the jury how Ritual is B. Singer & Co., and why it is?

A. That was their cable address and was probably registered in Sydney. Possibly, the government line out of Sydney registered it with the lines out of this country.

Q. That was an arrangement between B. Singer & Co. and the telegraph company by which any messages that came addressed "Ritual" would be delivered to them?

A. That is customary that a concern has a registered cable address if they have a long name they will have it registered—it saves expense.

Q. The object of it is to abbreviate the words?

A. That is it.

Q. Did you have your address registered with the Western Union Telegraph Company?

A. I don't think we did. I could not say positively. My impression is that we did not—that is as a cable address.

Q. Did you have with the Postal Telegraph Company?

A. I think not.

Q. What was the name of your firm?

A. H. W. Baker & Co.

Q. Do you know what the Australian duty was on lumber at the time you made this shipment?

A. Yes, sir; it was one shilling and sixpence.

Q. A thousand feet?

A. No, sir; that is per hundred superficial feet.

Q. How much was it a thousand?

A. That would be fifteen shillings a thousand.

Redirect Examination.

By Mr. GILMAN.—Q. Mr. Baker, I want to ask you the difference in commercial transaction between the sale of an article c. i. f. and a sale duty paid, having special reference to the Australian market?

A. A sale c. i. f. would be a sale either en route, afloat in case of a cargo matter, or a sale immediately on arrival before any discharging had taken place or demurrage had been incurred, etc. The sale is possible up to the time of the arrival of the ship and for say twenty-four hours afterwards if her demurrage does not begin till after that. The expression "sale, price duty paid," would mean that cargo landed with the costs added to it would be made up of the original cost of the cargo or the selling price of it and the marine insurance on the way, the freight on the way, land charges, consul fees, and wharfage, whatever it was, and the duty which would be paid after the discharge of the cargo before it would be available for delivery on the sale.

Q. Do you know what is the difference per thousand

on the Sydney market between the sale of lumber duty paid and a sale c. i. f.?

A. Well, it runs about two pounds in Sydney or a little over.

Testimony of witness closed.

It is admitted by counsel for defendant that the claim which is the basis of this suit has not been paid.

Here the plaintiff rests.

Counsel for defendant now offers in evidence the deposition of G. R. Mockridge, taken before Wellington Dale, a notary public at Penzance, Cornwall, England, which deposition is read to the jury as follows:

Deposition of G. R. Mockridge.

Q. What is your name, age, occupation, and place of residence?

A. George Robert Mockridge, 39 years of age. Superintendent of the Western Union Telegraph Company at Penzance, and I reside at Trewithen Road, Penzance.

Q. What, if any position did you hold in the employ of the defendant, the Western Union Telegraph Company, on October 1st 1891, and where were you so employed?

A. Superintendent and I was then employed at Penzance.

Q. If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance

prior to October 1st, and whether you have held it since, and if so, to what time?

A. Just over 10 years prior to 1st of October last, and since that time to the present date.

Q. Do you know what person or company was operating the telegraph cable line from Penzance to New York on October 1st, 1891?

A. Yes.

Q. If you answer the fourth interrogatory in the affirmative you may state who the person or company was?

A. The Western Union Telegraph Company.

Q. If, in answer to the fifth interrogatory, you say it was the defendant, the Western Union Telegraph Company, you may state if the defendant company received at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission, by it to Seattle, Washington, addressed to "Barker" or "Baker"?

Counsel for plaintiff objects to the question on the ground that the witness is not competent to answer unless the question is clearly intended for the purpose of showing that the files of the office showed a telegram on file addressed in the manner indicated in the question.

The COURT.—I will overrule the objection, the testimony is material as a connecting link in the case. I do not think that the witness is competent to prove that the message was addressed one way or the other, or what the contents of the message was at the time it was received, but it may, in connection with other testimony, show what the fact was.

A. The Western Union Company did receive at Pen-

zance from Sydney, Australia, on 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Counsel for plaintiff moves to strike out the answer on the same grounds stated in the objection to the question, and for the reason that the answer shows that the message, instead of being received from Sydney, New South Wales, was received by the Western Union Telegraph Company over a line of which they were joint lessees with the Eastern Cable Company from Porthcurno, their own office.

The COURT.—If there was an error in the delivery of the message from Porthcurno to Penzance, it would be a matter of proof, as to whether the error was on the part of the operator transmitting or the operator in taking it off and receiving the message, and it is on that theory that I admitted the previous answer, and on that theory, I will overrule this objection and allow this telegram to be admitted, subject to connecting proof. I think it is of some importance in the chain of circumstances to be shown in the case, what the message was that was taken off the wires at Penzance, but it is not of itself testimony that the error was committed at the other end of the line and does not show that the error was committed at one end of the line or the other.

Mr. BURLEIGH.—We take the position that the Western Union Telegraph Company did not become responsible for that message until it received it, and the party who delivers a telegram to a telegraph company is bound to see that it is properly delivered.

The COURT.—I differ with you about that. If the fault of delivery was on the part of the operator in receiving the message, that he was careless and wrote the name "Baker" so that he or another in the same office afterwards took it to be 'Barker," I think the fault would lie right there.

Mr. BURLEIGH.—But the burden of proving that the fault was on the Western Union Company's operator is on the plaintiff.

The COURT.—You are making your defense, and I will allow you to introduce this testimony, but at the same time, I do it guardedly, so as not to deceive you or the other side. I will not let it go to the jury as proof of that fact.

Q. If you answer the sixth interrogatory in the affirmative, you may state what person or telegraph company delivered said message to the defendant for such transmission?

A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Q. If you answer the last interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph company between Sydney and Penzance?

A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Q. Do you know whether the defendant the Western Union Telegraph Company was on the 1st day of October,

1891, the owner or lessee of, or was operating, the telegraph line over which said message came from Sydney to Penzance?

A. The Western Union Telegraph Company was on 1st day of October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno, in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Q. If you answer the ninth interrogatory in affirmative, you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date or when said message was transmitted over the same?

A. See my reply to the ninth interrogatory.

Q. 11. If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it, and cause it to be annexed to your deposition, and marked "Exhibit A."

A. I produce the said original message delivered by the Eastern Telegraph Company to the Western Tele-

graph Company on October 1st, 1891, and it is annexed to this deposition and marked "Exhibit A."

Counsel for defendant now offers in evidence the telegram referred to by the witness, in connection with the deposition.

Counsel for plaintiff objects on the same grounds urged in the last objection.

The COURT.—I will let it go in with the same limitations I have already made.

Telegram received in evidence and marked "Defendant's Exhibit A," attached to deposition of G. R. Mockridge, and reads as follows:

Defendant's Exhibit "A."

"Western Union Telegraph Company, lessees of The American Telegraph & Cable Company. Penzance Station. From Sydney Station to Barker, Seattle.

Offered four pounds thousand cif. advise accept market dull no outlet."

Said telegram is also indorsed upon its face as follows: "1 Oct., '91." And farther down: "This is the exhibit A mentioned in the eleventh interrogatory and answer thereto by George Robert Mockridge of the annexed interrogatories and answers and signed by the said George Robert Mockridge. 18th Novr., 1893. Wellington Dale, Notary Public."

Q. 12. Was any message received by the Western Union Telegraph Company, on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker," Seattle, and reading: "Offered four pounds thousand cif advise accept market dull no outlet."

A. No.

Q. 13. State whether, on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant the Western Union Telegraph Company from Penzance to New York, and if so, on what day the same was transmitted.

A. The message referred to in the sixth interrogatory, addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891.

Q. 14. Was the defendant at any time, to your knowledge, informed that the message "Exhibit A" was for "Baker" and not "Barker," Seattle? If so, when, where and by whom was such information given?

A. The defendant was informed that the message, "Exhibit A," was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance, by wire received from the Eastern Telegraph Company from their Porthcurno station.

Q. If you answer the fourteenth interrogatory in the affirmative, was such information in writing? If yea, and you have such writing, you will produce it, and deliver it to the officer taking your deposition identify it and cause it to be annexed to your deposition and marked "Exhibit B."

A. I produce the wire writing received, and it is annexed to this, my deposition, and marked "Exhibit B."

Q. 16. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked "Exhibit A" addressed either to "Barker" or "Baker"?

A. No.

Cross-Interrogatories and Answers.

Q. 1. You are working you say for the Western Union Telegraph Company of the United States, or that you were on October 1st, 1891?

A. Yes.

Q. 2. Do you say that a message came over the wire addressed "Baker Seattle, Washington. Offered four pounds thousand cif advise accept market dull no outlet." If so, did you receive this message. If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how did you know its contents? Why will you swear that it said: "Offered four pounds thousand"? Did it not say: "Offered fourteen pounds thousand"? Are you sure that the message was simply "Baker, Seattle, offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are, that it was only four pounds instead of fourteen?

A. I do not say that a message came over the wire addressed "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did

not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker, Seattle," did say: "Offered four pounds thousand." It did not say "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle," offered four pounds thousand cif, advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself.

Q. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is, the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet"?

A. We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet."

Q. 4. How do you know what arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become

the owner of said line? Or, if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and the owning of these lines? Are you president, secretary, or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it. Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

A. I do not know of any arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance beyond what is stated in my replies to the eighth and ninth interrogatories. I know of the arrangements on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangements on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of said line. They leased the line between Penzance and Porthcurno as aforesaid, about eight years ago. I am superintendent. I know nothing about the leasing and owning of these lines except that we work over the line between Penzance and Porthcurno and not beyond. I am neither president, secretary, nor manager. I do not sign the papers for this company or make their contracts. I did not sign the lease, and I do not know of any such indenture being signed.

Q. 5. Is the message, called original message, which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been

made in it since it was received? Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it, as you felt it was your duty, and attached the copy, instead of sending the original message, the official paper out of your office here to the city of Seattle, in the state of Washington, United States of America?

A. The said original message is not known as eleven, but is known as number seven and is the message I received. There has been no change made in it since it was received. I do not say that I have sent the original message out of the office and attached it to this interrogatory. By the original message, I mean the message as received at our office at Penzance and not the message as written by the sender at Sydney. I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told us to do it. It is not true that I made a copy of it and attached a copy instead of sending the original message, the original message itself was sent.

Q. 6. Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule in your office to destroy these original messages every six months from the date they are received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message as

attached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

A. I have not destroyed the original message received in this case. It is not true that we have a rule in our office to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule. This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, as the original message is the one attached hereto; it has not been destroyed. The message attached has not been prepared.

Q. 7. Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place, or its barrister? Did any general manager of your company or person acting for it, consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors advising you what your testimony should be, or the nature of it, or the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them, or any portion of them, or what to do concerning any of them? If so, from whom were these communications received and when did you receive them?

Have you been advised not to speak of these communications?

A. I have consulted no one before giving my testimony, concerning such testimony. I was not told to testify to anything nor was I told to omit anything. I have not consulted the solicitor to the company at my place, nor its barrister. No general manager of my company nor any person acting for such company consulted me concerning my testimony. I have received one letter only and that from the general solicitor of my company, and such letter did not advise me what my testimony should be or the nature of it or the manner of it, but such letter did point out to what my testimony should be directed. Such letter further explained that I should take the interrogatories before a notary and reply to them. This communication was received by me from George H. Fearsons on the 9th day of November, 1893. I have not been advised not to speak of this communication.

Q. 8. If you say you received no such communications do you now say so for the reason that you are now so advised to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you say so?

A. I say again that the only communication which I have received is the letter mentioned in my reply to the last cross-interrogatory.

(Signed) G. R. MOCKRIDGE.

(Duly attested.)

Exhibit "B."

The Western Union Telegraph Company, Lessees of the American Telegraph and Cable Company.

Recd from	Sent or handed to	P. K.
Time 6 3 p. m.	Time 6 0 p. m.	
Clerk C	Clerk P.	
To 7 P. K.	W. U. Tel Co. 9 Oct. 91 Penzance.	

Fm Seattle, Wn. 7 1st Baker Seattle Deld."

Indorsed on face: "This is the exhibit 'B' mentioned in the fifteenth interrogatory and answers thereto by George Robert Mockridge. Wellington Dale, Notary Public. G. R. Mockridge."

(Same formal heading.)

Recd from	Sent or handed to	P. K.
Time 5 34 a. m.	Time 5 50 a. m.	
Clerk B	Clerk B	
To P. K.	W. U. Tel Co. 9 Oct. 91 Penzance.	

From NY from Seattle Wn. 7 1st Barker Seattle and unk retd by Barker first Natl bank not for him."

Indorsed on face: (Same as above.)

(Same formal heading.)

Recd from P. K.	Sent or handed to C.
Time 2 12 p. m.	Time 2 19 p. m.
Clerk P	Clerk Luff
To 16 C	W. U. Tel Co. 9 Oct. 91 Penzance

Fm East our 7-1 Is to Baker Seattle pse say if still undeld. P.

Indorsed on face: (Same as above.)

Counsel for defendant now offers in evidence the deposition of Edward Chambers, taken before Wellington Dale, a notary public at Penzance, Cornwall, England, which is read to the jury as follows:

Deposition of Edward Chambers.

Q. 1. What is your name, age, occupation, and place of residence?

A. My name is Edward Chambers, and I am the manager of the Penzance office of the Western Union Telegraph Company and reside at Alverton Lodge, Penzance, and am 42 years of age.

Q. 2. What position, if any, did you hold in the employ of the defendant the Western Union Telegraph Company, on October 1st, 1891, and where were you so employed?

A. On the 1st October, 1891, I was manager of the Penzance office of the Western Union Telegraph Company, and I was then employed at Penzance.

Q. 3. If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance prior to October 1st, and whether you have held it since, and if so, to what time?

A. I held the position of manager of the said Penzance office for about seven years prior to 1st October, 1891, and have held it since that time and still hold it.

Q. 4. Do you know what person or company was operating the telegraph cable line from Penzance to New York on October 1st, 1891?

A. Yes.

Q. 5. If you answer the fourth interrogatory in the affirmative, you may state who the person or company was?

A. The Western Union Telegraph Company.

Q. 6. If in answer to the fifth interrogatory you say it was the defendant, the Western Union Telegraph Company, you may state if the defendant company received at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker"?

A. The Western Union Telegraph Company received at Penzance from Sydney Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Q. If you answer the sixth interrogatory in the affirmative, you may state what person or telegraph company delivered said message to the defendant for transmission?

A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Q. 8. If you answer the seventh interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph line between Sydney and Penzance?

A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Q. 9. Do you know whether the defendant, the Western Union Telegraph Company was on the 1st day of October, 1891, the owner or lessee of, or was operating the telegraph line over which said message came from Sydney to Penzance?

A. The Western Union Telegraph Company was, on the 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno, in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Q. 10. If you answer the 9th interrogatory in the af-

firmative, you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date, or when said message was transmitted over the same?

A. See my reply to the last interrogatory.

Q. If you have the original message, delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit A."

A. I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me, marked Exhibit "A," and annexed to the depositions of George Robert Mockridge, made herein this day.

Q. 12. Was any message received by the Western Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker, Seattle," and reading, "Offered four pounds thousand cif advise accept market dull no outlet"?

A. No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to "Baker," Seattle, and reading, "Offered four pounds thousand cif advise accept market dull no outlet."

Q. 13. State whether on the 1st day of October, 1891,

the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company from Penzance to New York, and if so, on what day the same was so transmitted?

A. The message referred to in the sixth interrogatory addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891.

Q. 14. Was the defendant at any time, to your knowledge, informed that the message "Exhibit A," was for "Baker," and not "Barker," Seattle? If so, when, where and by whom was such information given?

A. The defendant was informed that the said message "Exhibit A" to the deposition of the said George Robert Mockridge was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance, by wire received from the Eastern Telegraph Company from the Porthcurno station.

Q. 15. If you answer the fourteenth interrogatory in the affirmative, was such information in writing? If yea, and you have such writing, you will produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit B."

A. The information was by wire and is annexed to the said deposition of the George Robert Mockridge, marked "Exhibit B" and now produced to me.

Q. 16. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891,

than the message marked "Exhibit A," addressed either to "Barker" or "Baker"?

A. No.

Q. 17. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No.

Cross Interrogatories and Answers.

Q. 1. You are working you say for the Western Union Telegraph Company of the United States or that you were on October 1st, 1891?

A. Yes.

Q. 2. Do you say that a message came over the wire addressed "Baker, Seattle, Washington. Offered four pounds thousand cif advise accept market dull no outlet." If so, did you receive this message? If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how did you know its contents? Why will you swear that it said "Offrered four pounds thousand?" Did it not say "Offered fourteen pounds thousand?" Are you sure that the message was simply "Baker, Seattle, offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are that it was only four pounds instead of fourteen?

A. I do not say that a message came over the wire ad-

dressed, "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. Iswear that the message which was received, addressed to "Baker," Seattle, did say offered "four pounds thousand." It did not say "Offered fourteen pounds thousand." I am sure that the message was "Barker Seattle, offered four pounds thousand cif advise accept market dull no outlet" and not "Baker, Seattle, offered four pounds thousand" and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself, being Exhibit "A" above referred to. By t he words "Original message" I mean the message as received by our company at Penzance.

Q. 3. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle. Offered four pounds thousand cif advise accept, market dull no outlet."

A. I did not transmit the said message personally, but I know that such message was transmitted by our office as received and as follows: "Barker, Seattle, offered four pounds thousand cif advise market dull no outlet."

Q. 4. How do you know what arrangements the Western Union Telegraph Company had with the line from

Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become the owner of said line? Or if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and owning of these lines? Are you president, secretary, or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it? Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

A. I do not know of any arrangements which the Western Union Telegraph Company had with the line from Sydney to Penzance. I made no arrangement. I only know of the arrangement on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangement on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of said line. They leased the line between Penzance and Porthcurno as aforesaid in conjunction with the Eastern Telegraph Company. I am manager of the office at Penzance. I do not know about the leasing and owning of the lines, except that we work over the line between Penzance and Porthcurno and not beyond. I am not president or secretary, but am manager of the Penzance office. I do not sign the papers for this company and make their contracts. I did not sign any lease. I do not know of any indenture

by which the Western Union Telegraph Company bought this line.

Q. 5. Is the message, called original message, which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been made in it since it was received. Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it as you felt it was your duty and attached the copy instead of sending the original message, the official paper out of your office here to the city of Seattle, in the State of Washington, United States of America?

A. The message called original message marked Exhibit "A" and annexed to the deposition of the said George Robert Mockridge is not known as eleven, but as number seven and is the message received. There has been no change in it since it was received. I did not send the original message out of the office. The said George Robert Mockridge did and attached it to his interrogatory. The original message is attached to the depositions and not a copy thereof.

Q. 6. Is it not true that you have destroyed what you called the orinigal message received in this case? Isitnot true that you have a rule in your office to destroy these original messages every six months from the date they are received. Is it not true that, pursuant to this rule, this message, with all other messages, was destroyed? If not—if you say it is not so—why was it that you kept this one message? Is it not true that the message as at-

tached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

A. I have not destroyed the original message received in this case. It is not true that there is a rule in our office to destroy these original messages every six months from the date they are received. It is not true that pursuant to any rule this message with all other messages was destroyed. This message was kept in the same way as other messages. It is not true that the message as attached is not the original message and that the original message has been destroyed, because the original message has not been destroyed, but is attached as already stated and the message attached is not one which has been prepared.

Q. 7. Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place or its barrister? Did any general manager of your company or person acting for it consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors, advising you what your testimony should be, or the nature of it, or the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them or any portion of them or what to do concerning any of them? If so, from whom were these communications re-

ceived and when did you receive them? Have you been advised not to speak of these communications?

A. I have consulted no one, before giving my testimony here, concerning such testimony. I was not told to testify to any matter, neither was I told to omit any matter. I have not consulted the solicitor to the company at my place or its barrister. No general manager of our company or person acting for it consulted with me concerning my testimony, unless it can be said that the action of my superintendent, the said George Robert Mockridge informing me that I had to answer these interrogatories can be called consulting me. I have not received any letters from the general solicitor of the company or any other solicitor advising me what my testimony should be or the nature of it or the manner of it or what it was to be directed or what not or explaining to me these interrogatories or any part of them or any portion of them, or what to do concerning any of them. I have not been advised not to speak of any communication because I have received none.

Q. 8. If you say you received no such communications, do you now say so for the reason that you are advised so to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you so say?

A. I do not say that I have received no communication because I have been advised so to say. I say that I have not received such communication because I have not.

(Signed) EDWARD CHAMBERS.

(Duly attested.)

Counsel for defendant next offers in evidence the deposition of Michael J. O'Leary, which is read to the jury as follows:

[Caption.]

Deposition of Michael J. O'Leary.

Michael J. O'Leary, a witness called on behalf of defendant herein, and residing at the city of Brooklyn, New York more than one hundred miles from the place where this cause is to be tried being duly sworn to tell the truth, the whole truth and nohting but the truth, and being examined upon the interrogatories hereto attached, deposed and said as follows:

Q. 1. What is your name, age, occupation, and where do you reside?

A. My name is Michael J. O'Leary age 38, occupation chief clerk, Cable Message Bureau, Western Union Telegraph Company, New York, and I reside at 549 Pacific Street, Brooklyn, New York.

Q. 2. Were you in the employ of the defendant on October 1st, 1891, and if so, where, and in what capacity were you so employed?

A. Yes, as chief clerk Cable Message Bureau, in the Cable Bureau, New York City.

Q. 3. If you answer the second interrogatory that you were on that day in the employ of the defendant at its Ocean cable office in New York you may state how long you had been employed in its said office prior to and since October 1st, 1891.

A. Have been employed in that position continuously from 1884 to the present time in New York city.

Q. 4. Do you know if the defendant received at its Ocean cable office in New York, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker," Seattle?

A. Yes, I know that the Western Union Telegraph Company received at its ocean cable office in New York City on October 1st, 1891 a cable message addressed "Barker," "Seattle." It received no cable message on that day addressed "Baker Seattle."

Q. 5. If you answer the fourth interrogatory in the affirmative you may state what cable said message came over to NewYork and to whom the same was addressed when it arrived at New York.

A. Cable or Western Union Telegraph Company lessees of the American Telegraph and Cable Company, addressed "Barker," "Seattle."

Q. 6. If you have the original message referred to in the fifth interrogatory you will here produce it, identify it, and deliver it to the office taking your deposition, and cause it to be annexed to your deposition and marked Exhibit "C."

A. Original message as received at New York is hereto attached and marked "Exhibit C."

Q. 7. Was any message received by the defendant on October 1st, 1891, at New York, from Sydney, Australia, addressed to "Baker" Seattle, Washington, and reading, "Offered four pounds thousand cif advise accept market dull no outlet." A. No.

Q. 8. State whether on the 1st day of October, 1891, the message referred to in the fifth interrogatory was transmitted by the defendant from New York to Seattle, Washington, and if so on what day was the same so transmitted?

A. The said message was transmitted on the first day of October, 1891, addressed "Barker, Seattle."

Q. 9. Was the defendant at any time to your knowledge informed that the message Exhibit "C" was for "Baker" and not for "Barker," Seattle? If so, when, where, and by whom was such information given?

A. Defendant was informed on the 9th of October, 1891, by the Eastern Telegraph Company at Penzance, England, that the message was for Baker, Seattle.

Q. 10. Was any other message received by the defendant in New York from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked Exhibit "C," addressed either to "Barker" or "Baker"?

A. No.

Q. 11. You may state, if you know, if messages by cable from Australia on or about October 1st, 1891, were received by the defendant at any other office in New York than its cable office in which you were then employed?

A. No. Such messages are received only at the cable office.

Q. 12. If you know any other facts in reference to the controversy between the parties to this section, state them fully.

A. No other facts.

Q. 13. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No.

[Caption.]

Cross-Interrogatories and Answers.

Q. 1. You are the manager of the Western Union Telegraph Company, are you not? If you are not, what position do you hold? Are you not manager of the cable department of the Western Union Telegraph Company, and in charge of the same? If not, what position do you hold, and what position were you so holding on October the first, 1891?

A. My title and position is chief clerk Cable Message Bureau, and I am in charge of such bureau or department and have held this position continuously from 1884 to the present time.

Q. 2. Do you say that you saw a message addressed to Seattle, Washington, to "Baker"? If so, where did you see this message? If you say it was not so addressed, how was it addressed? If you say you saw it on the day of its delivery to your company, state what it was that attracted your attention to the message by which you can say that the letter "R" was not in the message—that is, in the name.

A. I saw no message addressed "Baker, Seattle." I saw a message addressed to "Barker, Seattle." Do not remember that I saw it on the day of its delivery. My attention would be attracted by the service messages attached correcting the address.

Q. 3. Where is the original message addressed to Baker if you produced it? Is the message produced to the original interrogatory the message? Is it not true that this is not the message but one that you have had prepared for the purpose of attaching to this case? And if so, who prepared it? And under whose directions and when?

A. Original message as received by this company at New York addressed "Barker" is attached to this deposition and marked "Exhibit C." It is the message produced to the original interrogatory. It is not true, and message attached is the original message received at New York, and was not prepared for the purpose of attaching to this case.

Q. 4. If you say the message received by your company from Sydney, Australia, was as follows: "Baker, Seattle, Washington offered four pounds thousand cif advise accept market dull no outlet," when did such message arrive, and when was it transmitted?

A. No such message was received by defendant company, and could not have been transmitted. The message received was addressed "Barker, Seattle."

Q. 5. Who does the transmission in your office of cablegrams; yourself? Who did the immediate transmission upon October 1st, 1891? If you give the person's name, where is such person? If you say you did not

yourself make the transmission, how do you know what was transmitted to the office at Seattle? If you say you do personally know what was transmitted at that time, state why it was that you gave your particular attention to this message so as to note when it was transmitted. Were you expecting a suit by reason of the mistake? Is it not true that you do not know who transmitted the message of your personal knowledge, from either having seen them or having transmitted the message yourself? Are you not testifying, and did you not testify in answer to your direct interrogatories—being the 7th and 8th—simply from what you have your record say concerning the same?

A. Telegraph operators and not myself. Operator Delano received at and operator Locke transmitted the Barker message from New York, and both are still in the service of the Western Union Telegraph Company at New York City. I know what was transmitted to Seattle because that office reported the receipt of the Barker message. I gave no particular attention to the message and was not expecting any suit. I did not transmit the message from New York, but do know who transmitted it. In answer to the 7th and 8th interrogatories, I testify from what my records show, from a personal examination of the Barker message, and from messages sent from the Seattle office, reporting that they were unable to deliver the message because it had been returned by "Barker 1st National Bank" as not being for him.

Q. 6. Do you know Mr. H. W. Baker of Seattle, the plaintiff in the above-named case? If you say you do not know him, do you remember a person, saying his

name was H. W. Baker of medium size, light complexion, hailing from the city of Seattle,who applied to you on the forenoon of Monday, June 13th, 1892, who asked you for the privilege of inspection of the orignal message addressed to him from Sydney, Australia? Did you permit him that privilege? Is it not a fact that you refused it? Dd you not give your reason for refusal that it was against the rules? And did you not do this after you had found the message and inspected it yourself and then declined?

A. Do not know H. W. Baker and do not remember his calling on me June 13th, 1892, but if he did call and asked the privilege of inspecting the original message, I have no doubt the privilege requested was refused, as it is against the rules of the company and I may have said so, but would have declined anyway. Of course, I had previousy inspected the message on receipt of the service message from Seattle, reporting unable to deliver, referred to in my answer to the fifth cross-interrogatory.

Q. 7. Are you acquainted with the gentleman who is taking your testimony? Have you had any conversation with your counsel or the counsel of your company or any other person as to what you should say? Have you had this testimony submitted to any gentleman interested in your company or counsel of your company, or who is hearing your testimony for their ratification or indorsement of the same or the correction of th same? If so, who is the gentleman—when and where? A. No.

Q. Who did you consult previous to going before the officer, to take your testimony, and what was your con-

sultation if it was about this case? If it referred to your testimony, what was it you were told not to testify or to testify, and have you so followed such direction? Have you received directions from any person as to what your testimony should be? If so, what person, when and where and what were the directions?

A. Have received no directions from any person and have consulted no one about the case or as to what my testimony should be.

Q. 9. Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule of your company and of your office to destroy those original messages every six months from the date they were received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message attached is not the original message at all, but that the original message has been destroyed, and the msesage you attached is one that has been prepared?

A. The message attached is the original received at New York and was never destroyed. Files of cable messages are destroyed twelve months after date. This message was not destroyed at that time as it was taken from the files for the purpose of this inquiry about May 24th, 1892. The message attached is the original received at New York and has not been prepared for this case.

(Signed) MICHAEL J. O'LEARY.

(Duly attested.)

E. H. BROWN, called as a witness in behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. BURLEIGH)—State your name and residence?

A. E. H. Brown, residence Seattle.

Q. How long have you lived here?

A. Since August, 1891.

Q. What business are you engaged in, Mr. Brown?

A. Manager of the Western Union Telegraph Company's office.

Q. How long have you been manager of the Western Union Telegraph Company at Seattle?

A. Since August 1st, 1891.

Q. Were you such manager on the 1st day of October, 1891?

A. Yes, sir.

Q. Do you know the plaintiff in this case, H. W. Baker?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I have been here.

Q. About when did you get acquainted with him, Mr. Brown?

A. I don't think I met him to get acquainted with him until some time in the spring of 1892.

Q. I will ask you to examine "Plaintiff's Exhibit A" and state to the jury what you know about the transac-

tion of the receipt and delivery of that telegram at the Western Union Telegraph Company's office in this city?

A. This telegram dated October 1st—Sydney October 1st and received here at eight o'clock and seven minutes on that morning from the Portland office. It is addressed "Barker, Seattle. Offered four pounds thousand cif advise accept market dull no outlet."

Q. When was that message received?

A. Eight o'clock, seven minutes on the morning of October 1st, 1891.

Q. By whom was it received?

A. The operator's letters are there,but I don't remember just now who that operator was. I think his name was Adams.

Q. What course would that cablegram take in your office on its receipt according to the usual course of business?

A. It is taken from the instrument table to the press table and a letter-press copy taken by the lady in charge; he then envelopes this and addresses it "Barker, Seattle," and then it is handed to the delivery clerk, sealed in an envelope and by the delivery clerk sent out by a messenger boy for delivery.

Q. Do you know what was done with that particular message on its receipt on the first of October, 1891, either personally or from the records of your office?

A. From the records I see that it was delivered at the Merchants' National Bank and receipted for by A. McIntosh, who was the president of the bank, and the time of that delivery was within a few minutes after the receipt of this message.

Q. What next occurred, calling your attention to that message?

A. I think it was some time in November, along in the middle or the latter part of November I was in the northern part of the city and, among other places, I called at Mr. Baker's office. He was not there, but I saw the bookkeeper, and I was asking how our business suited them—how our delivery and pick-ups and one thing and another suited them, and then he made mention of the fact to me that they had some trouble about a cablegram. I made a memorandum of the date of the message, where from, etc., and when I went back to the office I made inquiry about the matter.

Q. (By Mr. CARR)—What was the date, did you say, when this conversation occurred?

A. At Mr. Baker's office?

Q. Yes?

A. I don't know the exact date, but I should judge from some records I have got it must have been about the 20th of November.

Q. (By Mr. BURLEIGH)—Did you go to Mr. Baker on the 9th day of October about that message?

A. I don't know about this matter on the 9th of October.

Q. Did you at any time call on Mr. Baker and offer to settle the matter by paying him back the outlays and the costs of cabling that he had been to?

A. I have no recollection of it. I would have no authority whatever to make such a proposition.

Q. Did you ever have any authority to make any such proposition or to discuss that matter with him?

A. No, sir.

Q. Did you ever discuss it with him?

A. Not to my recollection, I don't think I did, sir.

Q. When was there any claim made on the company through you for damages for failure to deliver that telegram, if any was made?

Q. The first claim made was by an attorney that said he represented Mr. Baker.

Q. When was that?

A. I think that must have been February, 1892. I can't fix the date.

Q. I will ask you to look at this paper and state what that is, if you can, Mr. Brown?

A. That is what we call a "service message." It is a message sent by a clerk in my office and addressed to the Central Cable office, New York. We address all communications to that office in reference to cables. It reads: "C. C. Of's, N. Y. Sydneys 13 words Oc'r. first 'Barker' of Merchants' National Bank is only one known. He returns it to-day says not for him. Dick Seattle Wn. 8."

Q. Explain what you mean by service message?

A. It is a free message that we sent in the correction of service, or something like that.

Q. It relates to your own business?

A. It relates to business of our office—of the company.

Service message just identified by the witness and read, is here offered and received in evidence on the part of the defendant and marked "Defendant's Exhibit No. 3."

Q. I will ask you to state whether any reply came to that service message, if you can determine from the records of your office?

A. This is the reply to the one I just read (producing document): "Received at Seattle, Wash., 8:09 A. M., Oct. 9, 1891. To Seattle. From Cable Co. Sydney's 13 words 1st is to Baker repeat Baker not Barker. Can you now deliver reply. C. C. Office, N. Y." That last part is signed by the Central Cable office, New York.

Q. Could you tell what hour of the day the service message which is marked "Defendant's Exhibit No. 3" left here?

A. Yes, sir. 8:45 in the evening.

Q. What day?

A. The 8th. And this reply came on the morning of the 9th at 8:09.

Reply to service message just identified and read by the witness is now received in evidence and marked as "Defendant's Exhibit No. 4."

Q. What is this on the back of "Defendant's Exhibit No. 4"?

A. That is the reply to it—the answer is on the reverse side.

Q. Just read the answer?

A. This message we received from the cable office says there (referring to Defendant's Exhibit No. 4): "Can you now deliver?" We say: "C. C. Office, New York. Sydneys 13 words delvd this A. M. to Baker. S. Y. S. Seattle, Wn. 9." That is signed by the Seattle office on the 9th. Signed at 9:10 and the delivery was made.

The above telegram identified and read by the witness is now received in evidence and marked as "Defendant's Exhibit No. 5."

Q. I wish you would state to the jury what the business of the Western Union Telegraph Company was at its Seattle office in September and October, 1891, with respect to the volume of business being done?

A. Well, they were handling at that time between five and six hundred messages a day and perhaps more—I should say about six hundred messages a day at that time.

Q. Now you may state what the rules and practice of the company is as to messages, so far as their contents being divulged to any other people than the party for whom they are intended—what people in the telegraph office know the contents of a message which comes in and how many people see it in the course of business?

Counsel for plaintiff objects as immaterial and irrelevant.

The COURT.—I think what you are trying to prove is a matter of law. It is the business of a telegraph company to preserve the confidence of its patrons. He has testified as to the course of business in the office and the number of people who have to do with the message. Objection sustained.

Q. What is the practice of the telegraph company, Mr. Brown, as to cable addresses and what, if any, means is adopted for the shortening of addresses on cablegrams?

A. There is a system of registering an address. You would select some word, for instance a message comes

here addressed to "Jonas"—well, that word may be registered by some firm in town, and any messages received addressed to "Jonas" we would deliver to that firm.

Q. What is the object in having a cable address registered in that way?

A. Economy. It cheapens the price of them.

Q. How does it cheapen it—explain to the jury?

A. In calculating the tariff on cable messages everything is counted except the date, name to, and the street address and the city and town and each word in the body of the message and the words in the signature are counted.

Q. I want you to testify now whether there is any difference in the practice between cable messages and messages delivered in the United States in that regard?

A. Yes, sir. In that regard there is. Because in messages delivered in the United States the address and signature goes free and there is no charge for them.

Q. How is it as to cable messages?

A. In cable messages everything counts except the date—the place from and the date goes free.

Q. I offer you now the plaintiff's "Exhibit A," which is the original message in this case (showing) and I will ask you to state what there is connected with that message by which it could be delivered or its proper delivery ascertained other than the address?

A. I don't see anything about it that would indicate the particular line of business that it referred to.

Q. Did you know this man Barker to whom that message was delivered?

A. Yes, sir.

Q. Who was he and what was his business here?

A. He was vice-president of the Merchants' National Bank.

Q. You may state whether that was a prominent institution in Seattle at that time?

A. Yes, sir, it was.

Q. Was Mr. Abraham Barker a man of prominence here?

A. Yes, sir.

Q. Was there any other Barker here at that time who would have been likely, in your opinion, to have been connected with transactions on the other side of the world?

A. No, sir. There was none other here to my recollection.

Q. Are you able to tell the jury, Mr. Brown, how a message comes from Sydney to Seattle by wire?

A. Yes, sir. The first sending is to Melbourne, that is on the southern coast, and then from Melbourne around on the western coast to Perth, and then to the upper or northern part of Australia to Perth Amboy and from Perth Amboy it is passed across the sea to the Malay Islands, I think, and then across the Indian Ocean and the Red Sea and the Mediterranean Sea on to Gibraltar, and then from Gibraltar to the northern part of Spain, I think, and from the northern part of Spain across to Porthcurno and from Porthcurno to Penzance.

Q. Do you know from your telegraphic geography from Sydney to Porthcurno?

A. It is the Eastern Company, it is called the Eastern Cable Company.

Q. What is it, an European telegraph company?

A. Yes, sir, cable company.

Q. Is that a connecting line with the Western Union Telegraph Company?

A. Yes, sir. We connect with them.

Q. Do you know what company operates those lines how many stations they relay messages at between Sydney and Penzance?

A. I think it is fifteen—fifteen or sixteen, I could not say exactly.

Q. What is a relay station, Mr. Brown?

A. It is where the message is taken off one wire and passed on another line.

Q. What is the object of relaying messages?

A. Well, it gets to the end of the line and it is transferred over to another line and that is what is called a relay point. Here on our land lines we relay about every six hundred miles

Q. Why?

A. Because we can work much faster and quicker.

Q. You get a stronger and better current?

A. A better current.

Q. Is that the same reason they relay on the line between Sydney and Penzance?

A. No, sir. I think their cables cross the sea.

Q. They relay at the landing places?

A. At the landing places evidently.

Q. I will ask you to examine this book and state if you know what it is?

A. This is a book of rules and regulations and tariff

in use or adopted by the International Telegraph Convention.

Q. Is that a book that is familiar to all the telegraph people in the world?

A. Yes, sir. It is recognized as such.

Q. What does it contain?

A. It contains rules and regulations on which messages are received.

Q. Does it prescribe rules and tariff?

A. Yes, sir.

Q. Just turn to that book and state to the court and jury who the parties are to that convention?

A. Do you mean the parties or the countries?

Q. Yes, just read them over?

A. In this convention Great Britain was represented by J. C. Lamb, H. C. Fischer and P. Benton; for Germany, Hake, Scheffler and Le Sage; for the Argentine Republic, Santiago Alcorta and A. Gonzalez; for South Australia, Francis Dillon Bell; for Austria and Hungary, Obertraut, R. Neubauer, Dr. Benesch and Koller; for Belgium, F. Delarge; for Brazil, Itajuba for Bulgaria, Mattheef, J. P. Ivanoff; for the Cape of Good Hope, J. C. Lamb, H. C. Fischer and P. Benton; for Cochin China, G. Gabrie; for the Spanish Colonies, Primitivo Vigil; for Denmark, Honcke——

Mr. CARR.—We contend that it is not proper or necessary for him to state what this book contains.

Q. (By Mr. BURLEIGH)—Just state whether New South Wales was a party to that convention?

A. Yes, sir. New South Wales represented by Francis D. Bell.

Defendant offers in evidence the book identified by the witness, particularly paragraph 13, pages 17 and 18, in reference to telegraphic messages and addresses, being the rules and regulations controlling the telegraphic service all over the world outside of the United States, on the theory that a message sent at Sydney, New South Wales, over the government lines was subject to the rules and regulations and that Mr. Baker has not any rights superior to the man who sent the message at that point.

Plaintiff objects as irrelevant, immaterial, and incompetent.

Objection sustained. Exception noted for defendant.

Cross-Examination.

Q. (By Mr. CARR)—Mr. Brown, as superintendent and manager of the Seattle office of the Western Union Telegraph Co. in October and November, 1891, what was the general nature of your duties?

A. Manager of the office.

Q. What duties were you charged with?

A. Well, I had the supervision over all the help and the direction as to what each one should do and general supervision over the clerical force of the office and operators.

Q. When you say general supervision you mean you were charged with the duty of keeping the men up to their work, to keep the office going straight?

A. Certainly.

Q. If there are any mistakes or delinquencies, it is your duty to look after them?

A. Yes, sir.

Q. Is is not a constant rule of the office that a mistake of any importance must be reported to you as soon as it is discovered?

A. Yes, sir.

Q. That rule was in force in October, 1891?

A. It was always in force.

Q. It is true, then, is it not, that if any person connected with your office discovered that any mistake of any importance has been made, or it has been claimed to have been made it should be reported at once to you?

A. Yes, sir. That is his duty.

Q. It is a fact, is it not, that the mistake by which this or as the result of which, this telegram remained undelivered for nine days was a serious mistake, no matter by whom it was made?

A. Certainly.

Q. That is, it was, as matters since transpired, of a great deal of importance?

A. Yes, sir, subsequent events.

Q. And if you had known on the 9th of October that such a mistake had been made, that this message remained undelivered for nine days, you would have considered it of such importance as to at once institute very vigorous enquiries?

A. Certainly.

Q. Who was the person at the delivery desk in October, 1891?

A. It was a lady. Her name was Mrs. Overbeck.

Q. Did she have a signature of her own to service messages?

A. Yes, sir. "Dick."

Q. She signed as Dick on the service messages?

A. She was generally known in the office as "Dick."

Q. Among the general and regular customers at the desk she was known as "Dick"?

A. Yes, sir.

Q. That was the lady who wrote the service message?

A. Yes, sir.

Q. Ordinarily speaking she would have reported such a discovery to you at once?

A. Yes, sir. It should have been done.

Q. If she failed to do so she was guilty of a violation of the rules of the office?

A. Yes, sir.

Q. How long did she continue in the service of the company?

A. I think she left there some time in February or April, the next spring.

Q. In the mean time, as I understand your testimony, you had learned that she had committed this flagrant breach of rules by not reporting this trouble to you?

A. Yes, sir.

Q. And you had learned that all this communication between your office and New South Wales went on without your knowledge?

A. I knew that service message—I found out that the

service message had been sent and all the correspondence up to that time.

Q. What action, if any, did you take regarding such a breach of the rules?

A. I censured her very strongly and I removed her as soon as I could find some one else that suited me.

Q. You did not suspect at this time that the same person who would be guilty of such a violation of the rules of your office might be guilty of other breaches of the rules, or did you suspect anything of that kind?

A. No, sir. Nothing came up to attract my attention to it.

Q. Nothing came up to indicate to you that any of the other transactions in regard to this matter had been conducted in violation of the rules by this lady?

A. No, sir. Nothing attracted my attention.

Q. Did you report back to New York that the matter had not been called to your attention?

A. I wrote a letter reporting the whole facts of the case.

Q. Have you a copy of that letter?

A. I think it is in my letter book.

Q. You do not remember this conversation with Mr. Baker which took place, according to his statement on the very day the cablegram was delivered to him?

A. I didn't talk to him.

Q. You are still positive you knew nothing about the matter until along in November?

A. Until along in the middle of November—perhaps along about the 20th of November.

Q. Did you after that time have any difficulty in delivering messages regarding this lumber to Mr. Baker?

A. Not that I am aware of.

Q. You say that you were not personally acquainted with Mr. Baker up to this time in October?

A. No, sir.

Q. Did the accounts of your office pass through your hands at that time?

A. Yes, sir.

Q. Is it not true that for a long time prior to October 1st, 1891, Mr. Baker's monthly bills at your office for telegrams would average over sixty dollars?

A. I think they would. I think they were perhaps larger than that.

Q. From sixty to a hundred dollars a month?

A. He had quite a large bill every month.

Q. You did know H. W. Baker & Co. as patrons of your office to a large extent?

A. Yes.

Q. And you knew what business they were engaged in?

A. Yes. In a general way.

Q. You knew they were general commission and ship ping merchants?

A. Yes, sir.

Q. Did you know Mr. Abraham Barker?

A. Yes, sir. In a general way.

Q. You knew he was vice-president of the Merchants' National Bank?

A. Yes, sir.

Q. You knew he was engaged in the conduct of a financial institution?

A. Yes, sir.

Q. In the banking business?

A. Yes, sir.

Q. Do you know and did you know then what the usual unit of measurement or quantity was in speaking of lumber shipments?

A. No, sir. I was not familiar with the lumber business and I am not familiar with it now.

Q. Didn't you know then that lumber was generally spoken of by the thousand in mills and lumber yards?

A. In a general way, yes, sir.

Q. You knew that the term "so many thousand" was applied to lumber?

A. The price of lumber was by the thousand feet.

Q. Do you know of any other commodity in this market which was spoken of in the same way, in which you would use the term so many thousand feet?

A. I don't know that I recollect of anything special.

Q. Especially for foreign shipments?

A. No, sir.

Q. It is a fact, is it not, that during all this time large foreign shipments were being made of lumber from Seattle, Blakely, and other places on the sound?

A. I knew in a general way that there were some shipments being made. I didn't know how large or frequent.

Q. There was more or less cable business going through your office regarding lumber shipments all the time?

A. There may have been. I don't know the contents of those messages.

Q. Do you know what article dealt in by banks that a price would be apt to be cabled on an offer of so much a thousand from Australia?

A. No, sir, I don't.

Q. You say there is nothing in this Barker message of October 1st to indicate that it was not for Mr. Barker and that it was for Baker. There is the statement there offering four pounds thousand cif—that "cif" is a well-known commercial term?

A. Yes, sir. I see it quite often.

Q. That term of itself would indicate the character of the shipment of merchandise of some kind?

A. Possibly.

Q. And you think four pounds a thousand would not indicate anything of the nature of the commodity or the character?

A. It might indicate one thing and it might indicate another.

Q. It does not indicate anything which would lead anyone to believe that the message was intended for a banking institution?

A. I could not state that.

Q. After that did you ever have any trouble in delivering cable messages regarding this shipment of lumber to Baker?

A. There was one message came afterwards that I recollect.

Q. Was there any difficulty experienced in delivering it to Baker?

A. No, sir.

Q. What was it that indicated for whom it was intended?

A. It came from Sydney and it came to Barker and the delivery clerk says "That must be for Baker," and I said "Yes, certainly that must be a continuation of the same business."

Q. That is the cablegram, is it not?

A. November 24th. Yes, sir, that is the message.

Plaintiff introduces in evidence telegram identified by the witness, which is received without objection and marked "Plaintiff's Exhibit E," and reads as follows:

Plaintiff's Exhibit "E."

"Sydney, Nov. 24, 1891. Received at Seattle, Wash., 8:06 a.

"To Barker, Seattle. No market declining If not get handling bank would sacrifice. Reply immediate."

Q. There is no signature to that?

A. No, sir.

Q. It is addressed "Barker"?

A. Yes, sir.

Q. It does not say anything about so much a thousand?

A. No, sir.

Q. It does speak about a bank handling something?

A. It reads: "No. Market declining. If not get handling bank would sacrifice. Reply immediate."

Q. Still you did not even go to Barker with it?

A. No, sir. After we found out about the other message it is plain enough who it was for.

Q. But up to this time you didn't know anything about the previous matters—you said it was about the 20th when you heard of it first?

A. Yes, sir. A little before that. This was after I had heard about it. She called my attention to that message. She said, "There is another," and she wanted to know if I didn't think that should be for Baker, and I said, "Yes, it is from the same place and it is probably a continuation of the same subject."

Q. Did you ever make any effort to find out where the mistake was made in the message?

A. I wrote up to our company. I told them we had got another message for Barker.

Q. I wish you would explain to the jury what is the method of receiving those messages in the office. You have already told what was done with them from the time they passed through the operators' table, now what takes place before there is anything to leave the operator's table?

A. Generally we start in in the morning from Portland—they are general messages in the morning—and he keeps on sending messages to us.

Q. How does he send the messages?

A. Over the wire—telegraph.

Q. What is the method—some of these gentlemen may not have been in the telegraph business?

A. The operator at Portland sits down and ticks it off on his key and the sound comes here on the sounder at this end and the operator copies it from the sound.

Q. There is a system of dots and dashes?

A. Dots and dashes.

Q. Which the operator makes by pressing his key, a long or a short pressure making a dash or a dot and that all goes into the ear of the operator?

A. Yes, sir.

Q. And he writes it down with his pencil or pen?

A. Yes, sir.

Q. But in these days is it not true that a great deal of the work of receiving, that is of transcribing from the sounder, is done on the typewriter?

A. They use the typewriter now instead of the pen.

Q. The operator has a typewriter at his table and he listens to the sound of the instrument and writes it on the machine?

A. Yes, sir.

Q. That machine makes a clicking noise?

A. It makes a little noise.

Q. In 1891 that method prevailed largely, didn't it?

A. No, sir. I think we used a pen then.

Q. Didn't it prevail in the east to a considerable extent in 1891?

A. No, sir. We started the typewriter here before they did in the east. They only recently started it in the eastern office.

Q. When did they start to use the typewriter in the eastern offices?

A. In Chicago about a year ago on the Western Union line.

Q. When did you start here?

A. About three or four years ago. I don't recollect the exact date.

Q. You are yourself an operator, are you not?

A. Yes, sir.

Q. But you had nothing to do with the actual telegraphic work of receiving or sending any of these messages?

A. No, sir. I had operators who did that work.

Q. You didn't even hear them as they came in?

A. No, sir.

Q. And that word Baker comes over the wires "b,a,k,e,r"?

A. Yes, sir.

Q. First a dash and three dots for the "B"?

A. Yes, sir.

Q. And then a dot and dash for the "a"?

A. Yes, sir.

Q. And a dash and dot and dash for the "k"?

A. Yes.

Q. And one dot for the "e"?

A. Yes.

Q. And a dot and space and two dots for the "r"?

A. Yes.

Q. And then to get that "Barker" on the line it is necessary to put in between the dot and dash for the "a," a dot and space and two dots for the "r"?

A. Yes, sir.

Q. And that is a very marked insertion, is it not?

A. Yes, sir. That would be quite an insertion.

Q. It would even be worse than putting in a "d," or any other letter with only three characters used and a space between them, but here there is a perceptible pause between the first dot and the second for the "r"?

A. Yes, sir.

Q. If that message started from Sydney, New South Wales, without that dot and space and two dots in between those letters, at some point on these lines some man either in sending put in those extra characters, or the man receiving put them in there without hearing them, is not that true, or else the "Baker" was written in such a way that the "r" would be supposed to exist, that is, he heard the "r," but either wrote it so carelessly that, while it was intended for "Barker," yet it could be read "Baker," that is, that there was some little twist in his writing?

A. Yes, or the operator sending it might have read his copy wrong—he might have read it "Barker" and sent it that way.

Q. Conceding, now, that the message that is here is the original message, or a true copy of it, it reads "Baker," does it not, the one attached to the depositions?

A. The one filed in Sydney?

Q. As I understand, it reads "Baker"?

A. Yes.

Q. Conceding that it started in that way in the office as "Baker," if the mistake was made between the ope-

rator who ticked it off on his instrument and the operator who listened to it at the other end, if it was made between those two, then at the other place would be found the mistake "Barker"?

A. Yes, sir.

Q. And upon whatever division of this long system between here and Sydney that mistake was made, at one end of that division would be found a message reading "Baker" and at the other end the message reading "Barker"?

A. Yes, sir.

Q. That is absolutely beyond question?

A. That is beyond qu estion.

Testimony of witness closed.

Here the testimony is closed; whereupon the Court takes a recess until Monday morning, June 7th, 1897, at 10 o'clock.

June 7th, 1897, 10 o'clock A. M.

After the argument to the jury by counsel for the respective parties, the Court instructed the jury as follows:

Instructions by the Court

Gentlemen of the jury, the plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions ex delicto, or

actions arising from torts, that is, from wrongs committed.

To entitle the plaintiff to recover, it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff's rights and that that wrong has resulted in an injury and pecuniary damage to the plaintiff:

The two things must be connected together—the wrong and the resulting injury, so that it appears from the evidence that the injury resulted from the wrong in order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant's wrong.

A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness, accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in any injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated.

The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover, are in the first place, that the defendant company has committed a wrong. The defendant in this case is

not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake, or wrong committed by the defendant company or the other company which received the message at Sydney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated October 1st, 1891, which is before you, was filed in the cable company's office at Sydney for transmission, addressed to the plaintiff as "Baker," and that the said message was received by the defendant at its Seattle office addressed to "Barker," and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary that the plaintiff should show at what point between Sydney and Seattle the error was made which resulted in such change in address. I mean by this that if the two things are shown, First, that the message was properly written and delivered for transmission at Sydney and was misdirected when received at Seattle that in this action against the defendant company it is not necessary for the plaintiff to find the place on the line where the error occurred in order to have a right of action against the defendant company, but the burden of proof shifts upon the defendant company to overcome any presumption that the error was committed by its agents along its own line by proof that they re-

ceived the message in Seattle addressed the same as they received it at the other terminus of their line.

The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair preponderance of the evidence as to any fact about which there is a dispute, your verdict should be for the defendant.

In this connection I will say that the material facts are to prove that the message was delivered for transmission at Sydney as the complaint alleges it was, and that through an error in the address or delay in the delivery it was not delivered to Mr. Baker promptly as it should have been, and in consequence of the delay he has been injured.

These are the material facts which the plaintiff must prove, and he is bound to establish all of these facts by at least a fair preponderance of the evidence.

The Court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made by reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether upon its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employees is cast upon the defendant.

When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a

telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can show that all of its operators and agents and employees who were concerned in transmitting the message were free from negligence.

The Court directs your attention to the testimony given by the depositions of Michael J. O'Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route. These witnesses do testify to facts which are proper to be considered in this case bearing on the question as to whether the message was properly received, or properly delivered, I should say, to this company.

They show what was on file at the different offices, at Penzance and New York, but the point of this instruction is that they are not good witnesses to prove the condition in which the message came to the office at Penzance; they are giving, not the best evidence, but secondary evidence. They can only testify as to what some other person has placed in the records in their office, or has said about the matter; and the law requires that the witnesses who made those reports to these witnesses should give his testimony under oath the same as other witnesses in order to make it of the same character and

degree of credibility and reliability as the other testimony in the case. Because they are repeating to us here unsworn testimony is why I instruct you their testimony is not good to prove the fact in the case as to the condition of the message when transmitted from Porthcurno to Penzance.

So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message as recorded in the Penzance office was as shown by the copy attached to said deposition, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office in New York was as shown by the copy annexed to his deposition.

If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sydney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and day for it, and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employees, then your

verdict should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence.

You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are, and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matter of surmise, but any inference that may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employee of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability.

Gentlemen of the jury, you are to decide on the question of negligence in the case; you must find from the testimony what the facts are and say whether these facts constitute negligence which makes the defendant liable. In determining whether the defendant company has been negligent it is your duty to give consideration to all the facts that are proven, both as to the conduct of the defendant and its employes and representatives and all of the other actors in this transaction; Mr. Baker's failure to register a cable address by which he expected to receive messages before this transaction is one of the circumstances which you are to take into account because if he had done that it might have avoided this error. I do not say that it would and I am not saying that you should find that it did, but it is one of the circumstances

that a fair man would take into account and give consideration to before he would come to an ultimate decision on the point of whether the telegraph company was negligent or not. The condition of the message that was delivered for transmission as to the legibility of the writing would be an important circumstance to consider as bearing on the question of whether there was negligence or not. If it were shown that the error was committed in the office of transmittal and that the writing was plainly and legibly addressed to Baker, it would be strong, controlling evidence of negligence.

On the other hand, if it was so illegible and poorly written and indistinctly written that almost anybody might have made a mistake in it it would go very far towards disproving negligence. The testimony does not show what the condition of the writing was any further than there is testimony of a witness that the message he sent was directed to Baker, and there is a copy of a dispatch introduced in evidence which bears upon it an endorsement that would be legal evidence of an admission against the telegraph company that received it for transmission—an admission that that was received addressed to Baker, and there is an absence of testimony tending to prove that the writing delivered in Sydney was not legibly written.

Now from all that a presumption naturally arises that the message was started right; that Mr. Baker's agent in Sydney or his correspondent there delivered a message addressed to Baker and not one that might have been mistaken as being addressed to Barker, but the evidence

is entirely silent as to whether the error occurred in the office of transmittal—there is nothing to show that it occurred there, so that this question of the legibility of the writing can have but very little effect in aiding you in arriving at a decision. I mention that now because I am going to give you an instruction later on on the question of the legibility of writing.

The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended.

If this message had come to the Seattle office addressed to Abraham Barker and it had been delivered at Mr. Barker's place of business or his residence to a mature and prudent person—an adult, prudent person there according to the usual custom of business, it would be hard to blame the company for negligence in so delivering it, but a message simply directed to Barker, unless there was some previous understanding between Mr. Barker and the telegraph company by this having registered that address in the company's office according to their rules for registering, would not give them the right to send that message and drop it down on his desk or leave it in the hands of some other person without some inquiry as to whether he was the proper Barker that was entitled to receive it.

The manner in which the company's employes here in the Seattle office acted in regard to the delivery of this message, Mr. Baker's conduct, and all the facts that are shown in the case are to be taken into account, and from all this you are to reach a decision as to whether or not

this defendant has caused an injury by being negligent.

Before passing entirely from this it is proper for me to suggest to you that the testimony proves that this telegram was receipted for by Mr. McIntosh, the president of the bank, and there is no evidence tending to prove that the company or the employes of the company here did know that Mr. Barker was out of town. They naturally would expect that if the telegram was not intended for Mr. Barker that the matter would have been reported and they could have traced the matter up, but no report coming in, they would naturally suppose that the message had been properly delivered. The fact that a man of Mr. McIntosh's position and standing as a business man receipted for this telegram and failed to make any report for several days until Mr. Barker returned is among the other things which you are entitled to take into account and give what weight and consideration to as seems to you to be right.

The court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury find that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to "Barker," not "Baker," then no negligence can be imputed to the defendant for the error in the address when received at Seattle. The testimony, gentlemen—the uncontradicted testimony—proves that Penzance was the other terminus of the de-

fendant company's line and their responsibility for negligence begins at that office and not at Porthcurno. If the error occurred in transmitting the message from Porthcurno to Penzance and was a blunder on the part of the transmitter at Porthcurno, it would not be the negligence of this defendant. If the error was on the part of the operator who received the message in the Penzance office, then it would be negligence for which this defendant company is liable.

A party doing business with a telegraph company, and who is receiving messages under an abbreviated or assumed name owes it to the telegraph company that he advise it that he is so doing and that he expects messages so addressed, in order that no mistake may be made by such telegraph company in the delivery of such message.

The telegraph company is bound to deliver messages as they are addressed, and have no right to disclose the contents of any message to any person other than the one addressed. If the defendant received the message in question addressed to "Barker," then when it had reached its destination it had no right to disclose the contents to any person of the name of "Baker," so long as it was not informed that the message was intended for "Baker" and not for "Barker."

It is the duty of any person sending a telegram to another to make the address so plain as that the telegraph company may in the exercise of ordinary care and diligence, deliver the same without the necessity of making inquiry.

The defendant is not bound to show how or where the

mistake occurred. If it shows that it did not occur on its line or by its employes that is sufficient, and it is not required to go further and show how or where it did occur.

There has been some argument by counsel on different sides here upon this point. Counsel for plaintiff have argued that the defendant has not done as much as it should in disproving negligence unless it furnishes proof to show you that somebody else, and who committed the error.

Counsel for defendant has argued that it is necessary for the plaintiff to prove where the error occurred in order to fasten liability upon the defendant by proving that the error occurred in the work of the defendant company.

Now, they are both out of the way about that to some extent. The burden is not on the plaintiff to prove where the error occurred in order to have a right to recover from the defendant. The defendant is obliged to prove that the error did not occur in any of its offices, but it is not obliged to go further than that and prove where the error was committed. If the defendant has cleared itself that is all that it is called upon to do here.

If two persons should be suspected of having committed an injury it would not be necessary for one of them, in order to get clear, to prove not only that he did not do it, but also to prove that the other did. If the second party was the wrongdoer and had succeeded in concealing the evidence of his guilt it would afford no reason for fastening the guilt upon the other one. If the other one had gone as far as the law required to show innocence he

might rest there without fastening guilt upon anyone else. Now that is the case between the two connecting telegraph lines. The Western Union Telegraph Company is sued and if the Western Union Telegraph Company has proved that it is free from negligence it can stop there and it does not have to prove that the connecting line was negligent.

Now as to the measure of damages: If the plaintiff is entitled to recover at all he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sydney between the date of the telegram and the time when it was delivered to him.

If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two amounts with interest on the amount of the difference at the rate of seven per cent per annum from the date of the commencement of this action, February 20th, 1893. If you allow any damages at all you will cast up the interest on the amount of your award from the 20 day of February, 1893, until the date of your verdict. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the oppor-

tunity to deal with his property by reason of the delay in delivering the message.

To assess damages you will determine from the testimony what price Mr. Baker could have received for this cargo of lumber after he learned of the delay in the delivery of this message, and the difference between that price and the price at which he could have sold if he had received the other telegram promptly with interest as I have directed, will be the amount for which his damages should be assessed.

I have prepared two forms of verdict which you can take to your juryroom and use whichever one will conform to your decision. If you find in favor of the plaintiff you will use the one which reads "for the plaintiff" and fill the blanks by inserting the amount in dollars and cents which you award as damages and have it signed by your foreman and bring it in as your verdict; and if you find for the defendant the other form will answer and it is only necessary that it should be signed by your foreman.

Mr. BURLEIGH.—Before the jury retires, there is one point that I want to suggest to your mind. I ask the court to further instruct the jury on the point that is suggested by an instruction requested by the plaintiff, and which I did not notice until the court read it. The court instructed the jury and explained to the jury the competency and legal effect of the evidence of Mockridge and Chambers, superintendent and manager of the Western Union Telegraph Company at Penzance, the effect of which instruction was that they were not compe-

tent to testify to the telegram as it came to the Penzance office, or at least that it was not shown that they were competent. I would like to have your Honor instruct the jury that they were competent to testify to the originality of the paper which attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at the time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition being identified as the original copy in the Penzance office made at the time of the receipt of the telegram is the best evidence of the contents of the telegram as received there.

The COURT.—I think you are going a little too far in what you claim there Mr. Burleigh, about its being the best evidence of the telegram actually received there. According to the testimony, the telegram received at Penzance came by sounds, and the very best evidence of what was received in the office at Penzance would be the testimony of the person who heard the sounds and recorded them. I do not know how far our statutes may have made a telegram after it is transcribed legal evidence, but I do not think it would apply to a case of this kind or dispense with the proof as to what was transmitted by sound to that office.

I want the jury to understand by what I have said that the testimony of the witnesses who have given their depositions here, Mr. Chambers and Mr. Mockridge, is the best evidence obtainable, as to what the files in the office

at Penzance show was received as the message, and it is competent for that purpose, as I have said, that it is competent to be considered as bearing on the question, but it is not the best evidence as to how the message was transmitted from Porthcurno.

Thereupon the plaintiff requested the Court to instruct the jury as follows:

I.

"Gentlemen of the jury: The plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions ex delicto, or actions arising from torts, that is, from wrongs committed. To entitle the plaintiff to recover it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff's rights and that that wrong has resulted in an injury and pecuniary damage to the plaintiff."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

II.

"The two things must be connected together—the wrong and the resulting injury—so that it appears from the evidence that the injury resulted from the wrong, in order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant's wrong."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

III.

"A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in an injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

IV.

"The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover are, in the first place, that the defendant company has committed a wrong. The defendant in this case is not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake or wrong committed by the defendant company or the other company which received the message at Sidney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated October 1st, 1891, which is before you, was filed in the Cable Company's office at Sidney for transmission, addressed to the plaintiff as "Baker," and that the said message was received by the defendant at its Seattle office addressed to "Barker," and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary

that the plaintiff should show at what point between Sidney and Seattle the error was made which resulted in such change in address."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

V.

"The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair preponderance of the evidence as to any fact about which there is a dispute, your verdict should be for the defendant."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VI.

"The court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made. By reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether upon its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employes is cast upon the defendant. When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can show that the error was committed by some connecting line; in other words, when the error is shown to have been committed, the burden of proof is placed upon the company sued to show that it is not responsible for the error."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modi-

fied, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VII.

"The court directs your attention to the testimony given by the depositions of Michael J. O'Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VIII.

"So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message

as recorded in the Penzance office was as shown by the copy attached to said depositions, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office at New York was as shown by the copy annexed to his deposition."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

IX.

"If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sidney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and pay for it, and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employes, then your verdict

should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence. You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matter of surmise, but any inference that may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employe of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

X.

"Now as to the measure of damages: If the plaintiff is entitled to recover at all, he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sidney between the date of the telegram and the time when it was delivered to him.

"If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two, with interest at the rate of seven per cent per annum from the date of the commencement of this action. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the opportunity to deal with his property by reason of the delay in delivering the message."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the defendant requested the court to instruct the jury as follows:

1.

"That there is nothing on the face of this telegram which would indicate to a person not acquainted with the transaction that it refers to a sale of lumber or that it was intended to be delivered to the plaintiff in this ac-

tion. In cases where a telegram is so written that its contents convey no meaning to the agents of the telegraph companies into whose hands it may come for transmission and delivery, so that its importance may be fully understood, the sender takes the risk of the proper transmission and delivery of the message, and the company would be liable for but nominal damages for any error which might occur after it came into its hands."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

5.

"The court instructs you that from all the evidence introduced in this case it appears that this telegram when delivered to the Western Union Telegraph Company at Penzance, in England, was addressed to "Barker" and not to "Baker." It had no signature. There was nothing about the telegram from which the company could understand that it was intended for "Baker." It was therefore not negligence on the part of the defendant to deliver the telegram to "Barker."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

6.

"The jury is instructed that from all the evidence in this case the defendant does not appear to have been guilty of negligence either in the receipt, transmission or delivery of the message which it received, and therefore your verdict must be for the defendant."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

7.

"The jury is instructed that the measure of damages will be the difference between the price which was actually offered by the telegram of October 1, 1891, and the highest price thereafter offered and which might have been obtained by the plaintiffs for the lumber in question."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

8.

"The burden of proof is on the plaintiff to establish all the material facts of his case essential to a recovery. Before he can hold the defendant liable for changing the address of this telegram from "Baker" to "Barker" he must show that it came into the hands of the defendant addressed to "Baker" and was in some way changed to "Barker" by the defendant, its officers or employes."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

2

"The court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury finds that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to "Barker," not "Baker,"

then no negligence can be imputed to the defendant for delivering it to the only Barker at that time residing in Seattle who would be likely to be likely to be interested in transactions of any magnitude."

Which instruction was modified by the court and given as modified; and to the refusal of the court to give said instruction as requested, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted.

Thereupon the court instructed the jury as follows:

"Now from all that a presumption naturally arises that the message was started right."

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon the court instructed the jury as follows:

"The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended."

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon the court instructed the jury as follows:

"The manner in which the company's employes here in the Seattle office acted in regard to the delivery of this message, Mr. Baker's conduct and all the facts that are shown in the case, are to be taken into account and from all this you are to reach a decision as to whether or not this defendant has caused an injury by being negligent."

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon counsel for defendant requested the court to instruct the jury as follows:

"I would like to have your honor instruct the jury that Mockridge and Chambers, superintendent and manager respectively of the Western Union Telegraph Company at Penzance, were competent to testify to the originality of the paper which is attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at the time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition, being identified as the original copy in the Penzance office, made at the time of the receipt of the telegram, is the best evidence of the contents of the telegram, as received there."

Which instruction was refused by the court, and to the refusal of the court to give said instruction the defendant, then and there excepted.

All of which exceptions to instructions given by the court and refused by the court were taken in writing after the jury had retired to deliberate upon their verdict and before the rendition of their verdict for the reason that this court refused in all cases to allow exceptions to be taken in the presence of the jury, and would not have allowed exceptions to be so taken in this case had it been asked, but no request was made by either party to take such exceptions before the jury retired.

Now comes the defendant and presents this, its bill of exceptions to the court, pursuant to the rules and requests the court to sign and seal the same as the bill of exceptions in said action, which here and now the court does.

Dated June 28, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions proposed by defendant. Filed June 17, 1897 in the U. S. Circuit Court. A. Reeves Ayres, Clerk, By A. N. Moore, Deputy.

Bill of Exceptions as settled. Filed June 28, 1897 in the U. S. Circuit Court. A. Reeves Ayres, Clerk, By H. M. Walthew, Deputy.

[Title of Court and Cause.]

Judgment.

This cause having come on duly and regularly for trial before the court and a jury, and said cause having been duly and regularly tried before the court and a jury, and the jury having rendered a verdict herein on the 7th day of June, 1897, in favor of the plaintiff and against the defendant, for the sum of $3215.60, and a motion for a new trial having been made by the defendant and denied by the court, the plaintiff this day moves for judgment upon the verdict, and the court being fully advised in the premises grants said motion;

Wherefore, it is ordered, considered and adjudged that the plaintiff H. W. Baker, do have and recover of and from the defendant, The Western Union Telegraph Company, the sum of three thousand two hundred and fifteen dollars and sixty cents ($3215.60), with interest thereon at the rate of seven per cent per annum from the 7th day of June, 1897, together with the costs of this action taxed at $143.21, and that execution issue therefor.

Done in open court this 28th day of June, A. D. 1897.

Defendant excepts to the entry of the foregoing judgmenf, which exception is allowed by the court.

C. H. HANFORD,

Judge.

Received copy of the within judgment and service of the same admitted this 28th day of June, 1897.

I. D. McCUTCHEON &
BURLEIGH & PILES,
Atty. for Deft.

[Endorsed]: Judgment. Filed this 28th day of June, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Order as to Bill of Exceptions.

Be it remembered that on this 28th day of June, 1897, the above cause came on regularly to be heard on the defendant's motion for a new trial, a copy of which is as follows, to-wit:

In the Circuit Court of the United States, District of Washington, Ninth Circuit, Northern Division.

H. W. BAKER,
Plaintiff,
v.
THE WESTERN UNION TELEGRAPH COMPANY,
Defendant.
} No.

Motion for New Trial.

Now comes the defendant by I. D. McCutcheon and Burleigh & Piles its attorneys, and moves the court to set aside the verdict of the jury heretofore rendered in this action, and to grant a new trial of said action upon the following grounds, namely:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Error in the assessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict or other decision, and that it is against law.

IV.

Error in law occurring at the trial of said action and excepted to at the time by the defendant.

I. D. McCUTCHEON,
BURLEIGH & PILES,
Attorneys for defendant.

After full argument of the same by counsel for plaintiff and defendant respectively, and the court being duly advised in the premises, it was ordered that the same be denied, to which ruling and order denying said motion for a new trial the defendant then and there excepted, for that the court erred in not granting said motion of the defendant for a new trial.

And now, at the request of the defendant, in order that the foregoing matters may become a part of the record in said case, I here now sign this bill of exceptions.

Dated June 30, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed June 30, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

The Western Union Telegraph Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered therein on the 28th day of June, 1897, pursuant to said verdict, where

by it was considered ordered and adjudged that the plaintiff do have and recover of and from said defendant the sum of three thousand two hundred and fifteen and 60-100 dollars with interest thereon and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition, comes now by I. D. McCutcheon and Burleigh & Piles, its attorneys, and prays said Court for an order allowing said defendant to prosecute the writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States, in that behalf made and provided; and also that an order be made, fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that, upon the giving of said security, all further proceedings in this court shall be suspended and stayed, until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit; and that the transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the United States Circuit Court of Appeals.

And your petitioner will ever pray.

Dated this 8th day of July, 1897.

I. D. McCUTCHEON &
BURLEIGH & PILES,

Attorneys for defendant, the Western Union Telegraph Company.

Received true copy of the enclosed petition this 8th day of July, 1897.

PRESTON, CARR & GILMAN,
Attorney for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed July 8, 1897. A. Reeves Ayres Clerk, By A. N. Moore, Deputy.

[Title of Court and Cause.

Order Granting Writ of Error, etc.

This cause coming on this day to be heard in the courtroom of said court, in the city of Seattle, Washington, upon the petition of the defendant, the Western Union Telegraph Company, herein filed, praying for the allowance of a writ of error, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the assignment of errors also herein filed within due time, and praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow to said defendant the writ of error prayed for, and

It is ordered that upon the giving by said defendant, the Western Union Telegraph Company, of a bond according to law in the sum of six thousand seven hundred dollars ($6,700.00), the same shall operate as a supersedeas bond, and all proceedings be stayed pending the determination of said writ of error.

Dated this 8th day of July, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed July 8, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Assignment of Errors.

And now on this 8th day of July, 1897, comes the Western Union Telegraph Company, the above-named defendant, and plaintiff in error and in connection with its petition this day made to the judges of the United States Circuit Court of Appeals, Ninth Circuit, for the issuance of a writ of error from the said Court to the above named United States Circuit Court for the District of Washington, to review the judgment entered by said last-named court in this cause on June 28, 1897, says that in the records and proceedings in this cause, upon the hearing and

determination thereof in said Circuit Court of the United States for the District of Washington, in the Northern Division of said District, there was and is a manifest error in the following particulars, and in each thereof, to wit:

I.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"Gentlemen of the jury: The plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions ex delicto, or actions arising from torts, that is, from wrongs committed. To entitle the plaintiff to recover it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff's rights, and that that wrong has resulted in an injury and pecuniary damage to the plaintiff."

II.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The two things must be connected together,—the wrong and the resulting injury,—so that it appears from the evidence that the injury resulted from the wrong, in

order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant's wrong.

III.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness, accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in an injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated."

IV.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover are, in the first place, that the defendant company

has committed a wrong.The defendant in this case is not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake or wrong committed by the defendant company or the other company which received the message at Sydney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated Oct. 1st, 1891, which is before you, was filed in the Cable Company's office at Sidney for transmission, addressed to the plaintiff as "Baker," and that the said message was received by the defendant at its Seattle office addressed to "Barker," and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary that the plaintiff should show at what point between Sidney and Seattle the error was made which resulted in such change in address.

V.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair prepon-

derance of the evidence as to any fact about which there is a dispute your verdict should be for the defendant.

VI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The Court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made. By reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether on its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employees is cast upon the defendant. When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can be shown that the error was committed by some connecting line; in other words, when the error is shown to have been committed the burden of proof is placed upon the com-

pany sued to show that it is not responsible for the error."

VII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The Court directs your attention to the testimony given by the depositions of Michael J. O'Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route."

VIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message as recorded in the Penzance office was as shown by the copy attached to said depositions, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office at New York was as shown by the copy annexed to his deposition."

IX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message, and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sidney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and pay for it,and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employees, then your verdict should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence. You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matters of surmise, but any inference that

may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employee of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability."

X.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"Now as to the measure of damages: If the plaintiff is entitled to recover at all he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sidney between the date of the telegram and the time when it was delivered to him.

"If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two, with interest at the rate of seven per cent per annum from the date of the commencement of this action. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the opportunity

to deal with his property by reason of the delay in delivering the message."

XI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"Now from all that a presumption naturally arises that the message was started right."

XII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended."

XIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The manner in which the company's employees here in the Seattle office acted in regard to the delivery of this message, Mr. Baker's conduct and all the facts that are shown in the case, are to be taken into account and from all this you are to reach a decision as to whether or not this defendant has caused an injury by being negligent."

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

"That there is nothing on the face of this telegram which would indicate to a person not acquainted with the transaction that it refers to a sale of lumber or that it was intended to be delivered to the plaintiff in this action. In cases where a telegram is so written that its contents convey no meaning to the agents of the telegraph companies into whose hands it may come for transmission and delivery, so that its importance may be fully understood, the sender takes the risk of the proper transmission and delivery of the message, and the company would be liable for but nominal damages for any error which might occur after it came into its hands."

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

"The Court instructs you that from all the evidence introduced in this case it appears that this telegram when delivered to the Western Union Telegraph Company at Penzance, in England, was addressed to "Barker" and not to "Baker." It had no signature. There was nothing about the telegram from which the company could under-

stand that it was intended for "Baker." It was therefore not negligence on the part of the defendant to deliver the telegram to "Barker."

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

The jury is instructed that from all the evidence in this case the defendant does not appear to have been guilty of negligence either in the receipt, transmission, or delivery of the message which it received, and therefore your verdict must be for the defendant."

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

"The jury is instructed that the measure of damages will be the difference between the price which was actually offered by the telegram of October 1st, 1891, and the highest price thereafter offered and which might have been obtained by the plaintiff for the lumber in question."

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

"The burden of proof is on the plaintiff to establish all the material facts of his case essential to a recovery. Before he can hold the defendant liable for changing the address of this telegram from 'Baker' to 'Barker' he must show that it came into the hands of the defendant addressed to 'Baker' and was in some way changed to 'Barker' by the defendant, its officers or employees."

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

"The Court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury finds that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to "Barker" not "Baker," then no negligence can be imputed to the defendant for delivering it to the only Barker at that time residing in Seattle who would be likely to be interested in transactions of any magnitude."

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

"I would like to have your honor instruct the jury that Mockridge and Chambers, superintendent and manager respectively of the Western Union Telegraph Company at Penzance, were competent to testify to the originality of the paper which is attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at that time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition, being identified as the original copy in the Penzance office, made at the time of the receipt of the telegram, is the best evidence of the contents of the telegram as received there."

Wherefore, the said The Western Union Telegraph Company, plaintiff in error, prays that the said judgment of the Circuit Court of the United States for the District of Washington, Northern Division, be reversed, and that said court be directed to grant a new trial of said cause.

I. D. McCUTCHEON &
BURLEIGH & PILES,
Attorneys for the Western Union Telegraph Company, Defendant, Plaintiff in Error.

Service of the foregoing assignment of error, on the undersigned this 8th day of July, 1897, is hereby admitted.

PRESTON, CARR & GILMAN,
Attorneys for H. W. Baker, Plaintiff and Defendant in Error.

[Endorsed]: Assignment of Error. Filed July 8, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Citation.

The President of the United States, to H. W. Baker, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the state of California, on the 5th day of August, 1897, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and the Independ-

ence of the United States, the one hundred and twenty-first.

C. H. HANFORD,

District Judge, Presiding Judge of the United States Circuit Court for the District of Washington.

Attest: A. REEVES AYRES,

Clerk of the Circuit Court of the United States, for the District of Washington.

[Seal] By A. N. MOORE,

Deputy.

I hereby acknowledge service upon me of the foregoing citation, by delivery of a copy thereof to me, on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attorneys for Defendant in Error.

[Endorsed]: Filed July 9, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Order to Send up Original Exhibits.

On motion of I. D. McCutcheon, and Burleigh & Piles, attorneys for defendant:

It is ordered that in addition to the transcript of the record on appeal in this action, that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals at San Francisco, the following original papers in this action, to be by him safely kept and returned to this court upon the final determination of this action in said court of appeals, namely: Stipulation to take the deposition of George R. Mockridge and Edward Chambers, together with the interrogatories and cross-interrogatories thereto annexed; and also

The deposition of said George R. Mockridge and Edward Chambers, together with the defendant's Exhibit A thereto attached, and also plaintiff's Exhibit A.

Dated this 26th day of July, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed July 26, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit, do hereby certify the foregoing one hundred and eighty-four (184) typewritten pages, numbered from one (1) to one hundred and eighty-four (184) inclusive, to be a full, true, and correct copy of the record, and of all the proceedings had in the above and therein entitled suit, and that the same constitutes the return to the annexed writ of error wherein the above named defendant, the Western Union Telegraph Company, is plaintiff in error, and the above named plaintiff, H. W. Baker, is defendant in error, and that the same constitutes the transcript of the record upon appeal from the Circuit Court of the United States for the District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of preparing and certifying the said transcript on appeal, is the sum of fifty-five dollars and fifty-five cents ($55.55), and that the same has

been paid to me by I. D. McCutcheon and Burleigh & Piles, attorneys for the defendant, and plaintiff in error, the Western Union Telegraph Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this 30th day of July, A. D. 1897.

[Seal] A. REEVES AYRES,

Clerk U. S. Circuit Court, District of Washington, Ninth Circuit.

By R. M. HOPKINS,

Deputy Clerk.

[Title of Court and Cause.]

Writ of Error.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Western Union Telegraph Company, defendant and plaintiff in error, and H. W. Baker, plaintiff and defendant in error, manifest error hath happened to the great damage of the said, The Western Union Telegraph Company, plaintiff in error, as by this complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 5th day of August, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By A. N. MOORE,
Deputy Clerk.

Allowed: C. H. HANFORD,
Judge.

I hereby certify that a true copy of the foregoing writ of error was this day lodged with me and served upon me and by me duly filed.

Dated July 9th, 1897.

[Seal] A. REEVES AYRES,

Clerk of the Circuit Court of the United States for the District of Washington.

By A. N. MOORE,

Deputy Clerk.

I hereby acknowledge service upon me of the foregoing writ of error by delivery of a copy thereof to me on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attys. for Deft. in Error.

[Endorsed]: Filed July 9, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

Citation.

The President of the United States, to H. W. Baker, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the state of California, on the 5th day of August, 1897, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action

wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error,to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and the Independence of the United States, the one hundred and twenty-first.

C. H. HANFORD,

District Judge, Presiding Judge of the United States Circuit Court for the District of Washington.

Attest: A. REEVES AYRES,

Clerk of the Circuit Court of the United States, for the District of Washington.

[Seal] By A. N. MOORE,

Deputy.

I hereby acknowledge service upon me of the foregoing citation, by delivery of a copy thereof to me, on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attorneys for Defendant in Error.

[Endorsed]: Filed July 9, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

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vs. H. W. Baker.

Form No. 3.

CABLE MESSAGE.

THE WESTERN UNION TELEGRAPH COMPANY.

All **CABLE MESSAGES** received for transmission must be written on the Message Blanks provided by this Company for that purpose, under and subject to the conditions printed thereon, and on the back hereof, which conditions have been agreed to by the sender of the following message.

THOS. T. ECKERT, General Manager. **NORVIN GREEN, President.**

NUMBER	SENT BY	REC'D BY	No. OF WORDS	FROM
1250	D	Ao	13	Sydney

Received at Seattle, Wash. Sydney 29 Oct 1891 1889

To Barker

Seattle.

Offered four pounds thousand Of advise accept market dull no outlet

To guard against mistakes on the lines of this Company, the sender of every message should order it repeated; that is, telegraphed back from the terminus of said lines to the Originating Office. For such repeating, the sender will be charged in addition, one-half the usual tolls of this Company, on that portion of its lines over which such message passes.

This Company will not assume any responsibility in respect to any Message beyond the terminus of its own lines; and it is agreed between the sender of the following Message and this Company, that said Company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery to the next connecting Telegraph Company, of any unrepeated message, beyond the amount of that portion of the charge which may or shall accrue to this Company out of the amount received from the sender for this, and the other companies, by whose lines such message may pass to reach its destination; and that this Company shall not be liable for mistakes in the transmission or delivery, or for non-delivery to the next connecting Telegraph Company, of any repeated message, beyond fifty times the extra sum received by this Company from the sender for repeating such message over its own lines; and that this Company shall not be liable in any case for delays arising from interruptions in the workings of its lines, nor for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company to reach its destination.

This Company is not to be liable for damages in any case, where the claim is not presented in writing, within thirty days after the sending of the message.

Plaintiff's Exhibit A.

FILED JUNE 27, 1895

IN THE

U. S. CIRCUIT COURT.

A. Reeves Ayres,

CLERK,

BY.....*R. M. Hopkins,*

DEPUTY.

"A"

(Transmitting Form.)

THE WESTERN UNION TELEGRAPH COMPANY

LESSEES OF

The American Telegraph and Cable Company.

Received from

Time 8 51 m

Clerk a

Transmitted to

Time 4 4 a m

Clerk H

Remarks:

W. U. TEL. CO.

1 OCT. 91

PENZANCE.

No. 7

PENZANCE STATION, 13 188

Prefix No. of Message 7 No. of Words.

From Sydney Station.

To Barker Leadle

offered four pounds

thousand cwt advise

accept market dull

no outlet

"D" This is the Exhibit "A" mentioned in the Eleventh Interrogatory and answer thereto of George Robert Mockridge of the annexed Interrogatories and Answers and signed by the said George Robert Mockridge 18th Nov. 1893

Kellynton Dale

Notary Public

"B"

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

Recd. from	Sent or handed to
Time ____ m.	Time ____ m.
Clerk	Clerk

Prefix ____ No. of Message ____ No. of Words ____

To

W. U. TEL. CO.
9 OCT. 91
PENZANCE.

This is the Exhibit B mentioned in the fifteenth interrogatory and answer thereto by George Robert Mockridge and the annexed interrogatories and answers and signed by the said George Robert Mockridge

18th Nov 1893

Wellington Dale
Notary Public

"B"

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

PK

Recd. from	Sent or handed to
Time 5 34 a m.	Time 5 50 a m.
Clerk B	Clerk B

Prefix M No. of Message 2 No. of Words 22

To PK

W. U. TEL. CO.
9 OCT. 91
PENZANCE.

fm Ny fm Seattle
Wn y 1st Barker
Seattle and unk
retd by Barker
First Nat Bank
not for him

G R Mockridge

"B"

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

Recd. from	*Sent or handed to*
Time 2 12 p. *m.*	*Time* 9 14 p. *m.*
Clerk P	*Clerk* Luff

Prefix *No. of Message* 2 *No. of Words* 15

To 16 Wm C—	W. U. TEL. CO. 9 OCT. 91 PENZANCE.

Im cast over
7/1 Is to
Baker battle
I'll say if still
undeld
wait

G R Mockridge

and answers and signed by the said George Robert Mockridge
Wellington Dale
Notary Public

[Title of Court and Cause.]

Stipulation.

It is stipulated between the parties hereto that the depositions of G. R .Mockridge and E. Chambers, witnesses for the defendant, residing at Penzance, Cornwall, England, may be taken by virtue of this stipulation (and without commission or other authority or power) by any notary public there residing, at such time as said notary may fix; and the taking of said depositions may be adjourned from time to time to suit the convenience of said notary and said witnesses, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate and seal of said notary shall be sufficient proof of his name and official character, without other or further authentication; all other formalities being hereby expressly waived:

Said deposition, when taken, shall be mailed by said notary to the clerk of the above entitled court, Seattle, Washington, U. S. A., and may be read in evidence by either party, subject only to objection as to the competency, materiality or relevancy of the testimony set forth therein.

Dated October 2nd, 1893.

STRATTON, LEWIS & GILMAN,
Plaintiff's Attorneys.

TURNER & McCUTCHEON,
Attorneys for Defendant.

Title of Court and Cause.]

Interrogatories.

Interrogatories to be propounded to G. R. Mockridge and E. Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England:

First Interrogatory.

What is your name, age, occupation and place of residence?

Second Interrogatory.

What, if any, position did you hold in the employ of the defendant, the Western Union Telegraph Company, on October 1st, 1891, and where were you so employed?

Third Interrogatory.

If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance, prior to October 1st, and whether you have held it since, and if so to what time?

Fourth Interrogatory.

Do you know what person or company was operating telegraph cable line from Penzance to New York on October 1st, 1891?

Fifth Interrogatory.

If you answer the fourth interrogatory in the affirmative, you may state who the person or company was.

Sixth Interrogatory.

If in answer to the fifth interrogatory you say it was the defendant the Western Union Telegraph Company, you may state if the defendant company received, at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker"?

Seventh Interrogatory.

If you answer the sixth interrogatory in the affirmative you may state what person or telegraph company delivered said message to the defendant for such transmission.

Eighth Interrogatory.

If you answer the seventh interrogatory that it was the

Eastern Telegraph Company you may state if you know whether that company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

Do you know whether the defendant, the Western Union Telegraph Company was on the 1st day of October, 1891, the owner or lessee of, or was operating, the telegraph line over which said message came from Sydney to Penzance?

Tenth Interrogatory.

If you answer the ninth interrogatory in the affirmative you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date, or when said message was transmitted over the same?

Eleventh Interrogatory.

If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit A."

Twelfth Interrogatory.

Was any message received by the Western Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker," Seattle, and reading, "Offered four pounds thousand cif advise accept. Market dull. No outlet."

Thirteenth Interrogatory.

State whether on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and if so, on what day the same was so transmitted.

Fourteenth Interrogatory.

Was the defendant at any time, to your knowledge, informed that the message "Exhibit A" was for "Baker" and not "Barker," Seattle? If so, when, where and by whom was such information given?

Fifteenth Interrogatory.

If you answer the fourteenth interrogatory in the affirmative was such information in writing? If yea, and you have such writing, you will produce it and deliver it to the officer taking your deposition, identify it and cause

it to be annexed to your deposition, and marked "Exhibit B."

Sixteenth Interrogatory.

Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked "Exhibit A," addressed either to "Barker" or "Baker"?

Seventeenth Interrogatory.

Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

[Title of Court and Cause.]

Cross-Interrogatories.

Cross-interrogatories to be propounded to S. R. Mockridge and E. Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England.

First Cross-Interrogatory.

You are working, you say, for the Western Union Tele-

graph Company of the United States, or that you were on October 1st, 1891?

Second Cross-Interrogatory.

Do you say that a message came over the wire addressed "Baker, Seattle, Washington. Offered four pounds thousand cif. Advise accept market dull no outlet." If so, did you receive this message? If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how do you know its contents? Why will you swear that it said: "Offered four pounds thousand"? Did it not say "Offered fourteen pounds thousand"? Are you sure that the message was simply "Baker, Seattle. Offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are, that it was only four pounds instead of fourteen?

Third Cross-Interrogatory.

Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message did you transmit it from your office—that is, the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle. Offered four pounds thousand cif. Advise accept, market dull, no outlet"?

Fourth Cross-Interrogatory.

How do you know what arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become the owner of the said line? Or if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and the owning of these lines? Are you president, secretary or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it. Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

Fifth Cross-Interrogatory.

Is the message, called original message which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been made in it since it was received? Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it, as you felt it was your duty, and attached the copy in-

stead of sending the original message, the official paper out of your office here to the city of Seattle, in the State of Washington, United States of America?

Sixth Cross-Interrogatory.

Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule in your office to destroy these original messages every six months from the date they are received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message as attached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

Seventh Cross-Interrogatory.

Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place or its barrister? Did any general manager of your company or person acting for it consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors advising you what your testimony should be, or the nature of it, or

the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them, or any portion of them, or what to do concerning any of them? If so, from whom were these communications received and when did you receive them? Have you been advised not to speak of these communications?

Eighth Cross-Interrogatory.

If you say you received no such communications, do you now say so for the reason that you are advised so to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you so say?

STRATTON, LEWIS & GILMAN,
Solr's for Plaintiff.

TURNER & McCUTCHEON,
Attys. for Deft.

[Endorsed]: Filed Dec. 19, 1893. In the U. S. Circuit Court. A Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Answers to Interrogatories.

To all to whom these presents shall come:

I, Wellington Dale, notary public, residing and practicing at Penzance, in the County of Cornwall, England, do hereby certify that pursuant to the stipulation signed by the attorneys for the above named plaintiff and defendant, and dated the 2nd day of October, 1893, George Robert Mockridge and Edward Chambers, the witnesses named in the said stipulation, appeared before me on the 15th and 16th and 18th days of November, instant, when I took and completed their answers or depositions to the interrogatories and cross-interrogatories propounded by the said attorneys respectively in the above-named action, the said answers or depositions being hereunto annexed, and I further certify that previous to such answers or depositions being taken I duly administered to the said George Robert Mockridge and Edward Chambers the following oath: "You and each of you are true answers to make to all such questions as shall be asked you and each of you upon these interrogatories and cross-interrogatories without favor or affection to either party and therein you and each of you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

In Testimony Whereof, I, the said notary have hereunto subscribed my name and affixed my seal of office at Penzance aforesaid this eighteenth day of November, 1893.

[Seal] WELLINGTON DALE,
Notary Public, Penzance.

[Title of Court and Cause.]

Answers to Interrogatories by G. R. Mockridge.

Answers to interrogatories propounded to George Robert Mockridge and Edward Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale, of Penzance, aforesaid, notary public:

The said George Robert Mockridge, being first duly sworn, on oath deposes and says:

In Answer to the First Interrogatory.

George Robert Mockridge, 39 years of age, superintendent of the Western Union Telegraph Company at Penzance, and I reside at Trewithen Road, Penzance.

Second Interrogatory.

Superintendent, and I was then employed at Penzance.

Third Interrogatory.

Just over ten years prior to 1st October last, and since that time to the present date.

Fourth Interrogatory.

Yes.

Fifth Interrogatory.

The Western Union Telegraph Company.

Sixth Interrogatory.

The Western Union Telegraph Company did receive at Penzance from Sydney, Australia, on 1st day of October, 1891, a message for transmission by it to Seattle addressed to "Barker."

Seventh Interrogatory.

The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Eighth Interrogatory.

The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

The Western Union Telegraph Company was on 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and

Porthcurno in conjunction with the said Eastern Telegraph Company.

Tenth Interrogatory.

See my reply to the ninth interrogatory.

Eleventh Interrogatory.

I produce the said original message delivered by the Eastern Telegraph Company to the Western Telegraph Company on October 1st, 1891—and it is annexed to this deposition and marked "Exhibit A."

Twelfth Interrogatory.

No.

Thirteenth Interrogatory.

The message referred to in the sixth interrogatory addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on 1st day of October, 1891.

Fourteenth Interrogatory.

The defendant was informed that the message, "Exhibit A," was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance by wire received from the Eastern Telegraph Company from their Porthcurno station.

Fifteenth Interrogatory.

I produce the wire writing received and it is annexed to this, my deposition, and marked "Exhibit B."

Sixteenth Interrogatory.

No.

Seventeenth Interrogatory.

No.

G. R. MOCKRIDGE.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal] WELLINGTON DALE,
Notary Public.

[Title of Court and Cause.]

Answers to Cross-Interrogatories by G. R. Mockridge.

Answers to cross-interrogatories propounded to George Robert Mockridge and Edward Chambers, witnesses for the defendant in the above-entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale, of Penzance aforesaid, Notary Public.

The said George Robert Mockridge, in answer to the first cross-interrogatory, says:

Yes.

Second Cross-Interrogatory.

I do not say that a message came over the wire addressed, "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet. I did not receive such message. No one received such message. I did not transmit it to New

York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker, Seattle," did say "Offered four pounds thousand." It did not say "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds. I am so sure because I have seen and have now before me the original message itself.

Third Cross-Interrogatory.

We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: "Barker, Seattle, offered four pounds thousand cif. advise accept market dull no outlet."

Fourth Cross-Interrogatory.

I do not know of any arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance beyond what is stated in my replies to the eighth and ninth interrogatories. I know of the arrangements on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangements on the line between Penzance and Sydney.

The Western Union Telegraph Company did not become owner of the said line. They leased the line be-

tween Penzance and Porthcurno as aforesaid about eight years ago.

I am superintendent. I know nothing about the leasing and owning of these lines except that we work over the line between Penzance and Porthcurno and not beyond. I am neither president, sercetary nor manager. I do not sign the papers for this company nor make their contracts. I did not sign the lease, and I do not know of any such indenture having been signed.

Fifth Cross-Interrogatory.

The said original message is not known as eleven, but is known as number seven and is the message I received. There has been no change made in it since it was received.

I do not say that I have sent the original message out of the office and attached it to this interrogatory.

By the original message I mean the message as received at our office at Penzance and not the message as written by the sender in Sydney.

I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told me to do it. It is not true that I made a copy of it and attached the copy instead of sending the original message; the original message itself sent.

Sixth Cross-Interrogatory.

I have not destroyed the original message received in this case. It is not true that we have a rule in our office

to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule.

This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, as the original message is the one attached hereto; it has not been destroyed. The message attached has not been prepared.

Seventh Cross-Interrogatory.

I have consulted no one before giving my testimony concerning such testimony.

I was not told to testify to anything, nor was I told to omit anything. I have not consulted the solicitor to the company at my place nor its barrister. No general manager of my company nor any person acting for such company consulted me concerning my testimony.

I have received one letter only and that from the general solicitor of my company, and such letter did not advise me what my testimony should be or the nature of it or the manner of it, but such letter did point out to what my testimony should be directed. Such letter further explained that I should take the interrogatories before a notary and reply to them.

This communication was received by me from George H. Fearons on the 9th day of November, 1893.

I have not been advised not to speak of this communication.

Eighth Cross-Interrogatory.

I say again that the only communication which I have received is the letter mentioned in my reply to the last cross-interrogatory.

G. R. MOCKRIDGE.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal] WELLINGTON DALE.
Notary Public.

[Title of Court and Cause.]

Answers to Interrogatories by Edward Chambers.

Answers to interrogatories propounded to George Robert Mockridge and Edward Chambers witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale of Penzance aforesaid, Notary Public.

The said Edward Chambers, being first duly sworn, on oath deposes and says:

In Answer to the First Interrogatory.

My name is Edward Chambers, and I am the manager of the Penzance office of the Western Union Telegraph Company and reside at Alverton Lodge, Penzance, and am 42 years of age.

Second Interrogatory.

On the first October, 1891, I was manager of the Penzance office of the Western Union Telegraph Company, and I was then employed at Penzance.

Third Interrogatory.

I held the office of manager of the said Penzance office for about 7 years prior to 1st October, 1891, and have held it since that time and still hold it.

Fourth Interrogatory.

Yes.

Fifth Interrogatory.

The Western Union Telegraph Company.

Sixth Interrogatory.

The Western Union Telegraph Company received at Penzance from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Seventh Interrogatory.

The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Eighth Interrogatory.

The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

The Western Union Telegraph Company was on the 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Tenth Interrogatory.

See my reply to the last interrogatory.

Eleventh Interrogatory.

I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me marked "Exhibit A" and annexed to the depositions of George Robert Mockridge, made herein this day.

Twelfth Interrogatory.

No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to "Baker," Seattle, and reading "offered four pounds thousand cif advise accept market du ll no outlet."

Thirteenth Interrogatory.

The message referred to in the sixth interrogatory addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on 1st day of October, 1891.

Fourteenth Interrogatory.

The defendant was informed that the said message, "Exhibit A," to the deposition of the said George Robert Mockridge, was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance by wire received from the Eastern Telegraph Company from the Porthcurno station.

Fifteenth Interrogatory.

The information was by wire and is annexed to the said deposition of the said George Robert Mockridge, marked "Exhibit B," and now produced to me.

Sixteenth Interrogatory.

No.

Seventeenth Interrogatory.

No.

Answers to Cross-Interrogatories by Edward Chambers.

First Cross-Interrogatory.

Yes.

Second Cross-Interrogatory.

I do not say that a message came over the wire addressed "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker," Seattle, did say "offered four pounds thousand." It did not say, "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself, being Exhibit A above referred to.

By the words "original message" I mean the message as received by our company at Penzance.

Third Cross-Interrogatory.

I did not transmit the said message personally, but I know that such message was transmitted by our office as received and as follows: "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet."

Fourth Cross-Interrogatory.

I do not know of any arrangements which the Western Union Telegraph Company had with the line from Sydney to Penzance.

I made no arrangement. I only know of the arrangement on the line between Penzance and Porthcurno because of our using such line, but I do not know of any arrangement on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of the said line. They leased the line between Penzance and Porthcurno as aforesaid in conjunction with the Eastern Telegraph Company. I am manager of the office at Penzance.

I do not know about the leasing and owning of the lines except that we work over the line between Penzance and Porthcurno and not beyond. I am not president nor secretary, but I am the manager of the Penzance office. I do not sign the papers for this company and make their contracts. I did not sign any lease. I do not know of any indenture by which the Western Union Telegraph Company bought this line.

Fifth Cross-Interrogatory.

The message called original message, marked Exhibit A and annexed to the deposition of the said George Robert Mockridge, is not known as eleven, but as number seven and is the message received. There has been no change in it since it was received. I did not send the original message out of the office, the said George Robert Mockridge did and attached to his interrogatory. The original message is attached to the depositions and not a copy thereof.

Sixth Cross-Interrogatory.

I have not destroyed the original message received in this case. It is not true that there is a rule in our office to destroy these original messages every six months from the date they are received. It is not true that pursuant to any rule this message with all other messages was destroyed.

This message was kept in the same way as other messages. It is not true that the message as attached is not the original message and that the original message has been destroyed, because the original message has not been destroyed, but is attached as already stated and the message attached is not one which has been prepared.

Seventh Cross-Interrogatory.

I have consulted no one before giving my testimony here concerning such testimony.

I was not told to testify to any matters, neither was I told to omit any matter.

I have not consulted the solicitor to the company at my place or its barrister.

No general manager of our company or person acting for it consulted with me concerning my testimony, unless it can be said that the action of my superintendent, the said George Robert Mockridge, informing me that I had to answer these interrogatories can be called consulting one. I have not received any letters from the general so-

lictor of our company or any other solicitor advising me what my testimony should be or the nature of it, or the manner of it, or what it was to be directed or what not, or explaining to me these interrogatories or any part of them, or any portion of them or what to do concerning any of them. I have not been advised not to speak of any communication, because I have received none.

Eighth Cross-Interrogatory.

I do not say that I have received no communication, because I have been advised so to say. I say that I have not received such communication because I have not.

EDWARD CHAMBERS.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal] WELLINGTON DALE,
Notary Public.

[Endorsed]: Published and filed Dec. 19, 1893, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Endorsed]: No. 391. United States Circuit Court of Appeals, for the Ninth Circuit. The Western Union Telegraph Company, Plaintiff in Error, v. H. W. Baker. Transcript of Record. Error to the United States Circuit Court for the District of Washington, Northern Division.

Filed Aug. 3, 1897.

F. D. MONCKTON,
Clerk.

No. 391.

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY.
Plaintiff in Error,

VS.

H. W. BAKER,
Defendant in Error.

Error to the United States Circuit Court for the District of Washington,

NORTHERN DIVISION.

Points and Authorities for Plaintiff in Error.

GEO. H. FEARONS,
I. D. McCUTCHEON,
R. B. CARPENTER,
Attorneys for Plaintiff in Error.

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,* *vs.* H. W. BAKER, *Defendant in Error.*	No. 391.

Error to United States Circuit Court for the District of Washington, Northern Division.

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought by H. W. Baker against the Western Union Telegraph Company in the Circuit Court of the United States for the District of Washington, Northern Division, for damages for delay in the delivery of a message sent by B. Singer & Company from Sydney, Australia, to H. W. Baker & Company, Seattle, Washington. The damage alleged to have been sustained was in consequence of the loss of the sale of a cargo of lumber shipped by the defendant in error to B. F. Singer & Co. at Sydney. The case was tried before Hon. C. H. Hanford, District Judge, sitting as a Circuit Judge, and a jury. Verdict for plaintiff, $3,215.60. Motion for new trial duly made on the grounds stated in the

Record, at page 23, and denied. The defendant brings the case here by writ of error to reverse the judgment and direct the Circuit Court to grant a new trial. The errors alleged are set out on pages 169 to 180, inclusive.

Assignment of Errors and Argument.

The questions of law in this case arise upon the charge of the Court to the jury set out in the assignment of errors, on the pages aforesaid, and errors of law occurring at the trial. We rely upon each of the errors so specified, but will make the following specifications as a portion of the errors relied on in the case.

I.

The Court erred in charging the jury that "the plaintiff in this case seeks to recover damages for an injury "alleged to have been suffered by him in consequence "of a wrong committed by the defendant. The action "belongs to the class of actions that are known by lawyers as actions *ex delicto*, or actions arising from torts, "that is, from wrongs committed." (Record, pp. 132–3).

It is respectfully submitted that this is not an action in tort, but an action on the contract set out in the Record, page 191.

"Where there is an undertaking without a contract, "there is a duty incident to the undertaking, and if it is "broken there is a tort, and nothing else. The rule "that, if there is a specific contract, the more general "duty is superceded by it, does not prevent the general "duty from being relied on where there is no contract "at all."

Webb's Pollock on Torts, p. 653.

The same learned author further says: "Now that the "forms of pleading are generally abolished or greatly "simplified, it seems better to say that wherever there "is a contract to do something, the obligation of the con- "tract is the only obligation between the parties with re- "gard to the performance, and any action for failure or "negligence therein is an action on the contract; and "this whether there was a duty antecedent to the con- "tract or not." (*Id.*, p. 654.)

Primrose vs. *W. U. T. Co.*, 154 U. S., p. 1.
McAndrew vs. *Elec. Tel. Co.*, 17 Q. B., 3.
Playford vs. *United Kingdom Elec. Tel. Co.*, L. R. 42, p. 706.

As it is evident that there was a contract for the transmission of this message from Penzance, England, to Washington, the obligation of the company in regard to its performance must be determined by the provisions of that contract.

Aside from this universal principle of law, the complaint itself clearly indicates that the action is upon the contract. Paragraph VII of said complaint is as follows:

"That the said telegram was duly sent over the said "defendant's wires, the said defendant receiving the said "telegram as the carrier of telegrams and messages for "value received, and the said defendant was duly paid "and did receive and accept due pay and consideration "for the prompt and correct transmission of the said "telegram from the said B. Singer to the said H. W. "Baker & Co., and did, both by its relations to the pub- "lic and its public capacity as a public corporation, *and*

" *its contract from the said B. Singer and the said H. W.*
" *Baker & Co. at the time of the receipt of the said tele-*
" *gram, contract and agree and promise to correctly, faith-*
" *fully, accurately, diligently, and carefully, and with*
" *promptness receive, transmit and deliver the said tele-*
" *gram from said B. Singer to the said H. W. Baker*
" *& Co.*" (Record, pp. 9–10.)

If this is not an allegation of a contract between the plaintiff and the defendant, it would be difficult to know what language could be used to constitute such a contract.

That such a contract is valid and binding upon the parties thereto is fully and conclusively settled by the Supreme Court of the United States in the case of *Primrose* vs. *The Western Union Telegraph Company, supra.*

In the last cited case, Mr. Justice Gray, who delivered the opinion of the Court, said: " The conclusion is irre-
" sistible that if there was negligence on the part of the
" defendant's servants, a jury would not have been war-
" ranted in finding that it was more than ordinary negli-
" gence; and that, upon principle and authority the mis-
" take was one for which the plaintiff, not having had the
" message repeated according to the terms printed upon
" the back thereof, and forming part of his contract with
" the company, could not recover more than the sum
" which he had paid for sending the single message "
(p. 27).

The same learned justice further said: " Beyond this,
" under any contract to transmit a message by telegraph,
" as under any other contract, the damages for a breach
" must be limited to those which may be fairly considered
" as arising, according to the usual course of things, from

" the breach of the very contract in question, or which " both parties must reasonably have understood and con- " templated, when making the contract, as likely to result " from its breach. This was directly adjudged in *West-* " *ern Union Telegraph Co.* vs. *Hall*, 124 U. S., 444."

According to these authorities, if the plaintiff had any right of recovery that right rested solely on the provisions and conditions of the contract.

It would be equally illogical and unreasonable where parties have made a contract to perform a certain thing that one of them should have the right to bring another and different action independent of and outside the contract.

It is immaterial in what form the contract comes before this Court, if it is in the record, if the proofs shows its execution and delivery and the defendant acted upon it, that is enough.

II.

We submit that the learned Judge erred in charging the jury that " A telegraph company engaged in the " business of transmitting intelligence for pecuniary " compensation is charged with the duty of exercising a " high degree of care as to promptness, accuracy, and " good faith in transmitting the message from the sender " to the one to whom it is addressed; and any neglect to " exercise the requisite degree of care in any of these " particulars which results in any injury, gives a right of " action and entitles the injured person to have the loss " that has been sustained made good or the injury com- " pensated." (Record, p. 133.)

A great number of cases from different States might be cited to show that this "high degree of care" is not required of a telegraph company when the message is sent upon one of its blanks; that only ordinary care is requisite, and that the company cannot be held liable except in cases of wilful misconduct or gross negligence. It is unnecessary, however, to cite other authorities, for that of *Primrose* vs. *Western Union Telegraph supra* is exactly in point.

The English cases are to the same effect.

MacAndrew vs. *Elec. Tel. Co., supra.*

Playford vs. *United Kingdom Elec. Tel. Co., supra.*

III.

We respectfully submit that the Court erred in charging the jury that "When in an action of this kind it is "shown by competent evidence that a telegram has been "delivered to a telegraph or cable company for trans- "mission and that an error has been committed in its "transmission, resulting in damage, and suit is brought "against the company which last received and delivered "the message, the law presumes that the responsibility "for such error rests with that company, unless it can "show that all of its operators and agents and employees "who were concerned in transmitting the message were "free from negligence." (Record, pp. 135–6.)

The first objection to this instruction is that it assumes such a state of facts to be shown by competent testimony, and upon that assumption assumes a presumption of law, whereas all that could be said properly upon the subject was that evidence had been introduced tending to prove

such a state of things, and from that evidence no presumption of law whatever would arise. From the fact that there was testimony to show that the message was written at Sydney and placed upon the wires at Sydney, to Baker, there is no presumption of law that in its transmission to Penzance—during which there were fifteen relays of the message (Record, p. 118); that is, that the message was taken off one wire and passed on another wire and line fifteen times—that the word Baker continued to be on the wire and was so delivered at Penzance. There is no presumption of law about it. It is solely a matter of testimony. The law does not presume upon which line the mistake was made, the first or last, hence the necessity of testimony to fix the responsibility upon the defendant.

But the error of the instruction does not stop here, because there was direct and positive proof at the trial of the contents of the message received by the company at Penzance and transmitted to Washington. That testimony should have been left to the jury with the other testimony in the case, but it was excluded from the jury, practically, by the Court.

Assuming the Court to have been right in regard to the presumption, the presumption would cease when testimony was introduced that disproved it.

Lawson on Presumptive Evidence, p. 576.

The deposition of George R. Mockridge, superintendent of the company at Penzance, taken at Penzance, was read in this case, and in answer to the following question the deponent said:

"Q. If you answer the sixth interrogatory in the "affirmative, you may state what person or telegraph "company delivered said message to the defendant for "such transmission."

"A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission."

"Q. If you answer the last interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph company between Sydney and Penzance."

"A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance." (Rec., p. 80.)

"Q. If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it, and cause it to be annexed to your deposition, and marked 'Exhibit A.'"

"A. I produce the said original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and it is annexed to this deposition and marked 'Exhibit A.'" (Rec., pp. 81–2.)

The telegram was then received in evidence and marked "Defendant's Exhibit A," attached to the deposition of G. R. Mockridge, and reads as follows:

"Defendant's Exhibit A. Western Union Telegraph

" Company, lessees of The American Telegraph & Cable " Company. Penzance Station. From Sydney Station " to Barker, Seattle.

"Offered four pounds thousand cif. advise accept " market dull, no outlet." (Rec., p. 82.)

Not only does this witness positively identify and swear to this exhibit as the original message forwarded by the company from Penzance to Seattle, but he negatives the idea of the reception of any other message at that time of a similar character.

" Q. 12. Was any message received by the Western Union Telegraph Company, on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to 'Baker,' Seattle, and reading 'Offered four pounds thousand cif advise accept market dull no outlet?'"

" A. No."

" Q. 13. State whether, on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and, if so, on what day the same was transmitted?"

" A. The message referred to in the sixth interrogatory, addressed 'Barker, Seattle,' was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891." (Rec., p. 83.)

On cross-examination, in answer to Q. 2, the same witness said:

" A. I do not say that a message came over the wire addressed 'Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no out-

let.' I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to 'Barker, Seattle,' did say: 'Offered four pounds thousand.' It did not say 'offered fourteen pounds thousand.' I am sure that the message was 'Barker, Seattle, offered four pounds thousand cif, advise accept, market dull, no outlet,' and not Baker, Seattle offered four pounds thousand and not 'fourteen pounds.' I am so sure because I have seen and have now before me the original message itself."

"Q. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is, the Western Union Telegraph Comyany's office—for which you are acting, 'Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet?'"

"A. We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: 'Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet.'" (Rec., pp. 84–5.)

The same witness in answer to Q. 5 said:

"A. The said original message is not known as eleven, but is known as number seven, *and is the message I received.* There has been no change made in it since it was received. I do not say that I have sent the original message out of the office and attached it to this interro-

gatory. By the original message I mean the message as received at our office at Penzance, and not the message as written by the sender at Sydney. I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told us to do it. It is not true that I made a copy of it and attached a copy instead of sending the original message; the original message itself was sent. (Rec., p. 87.)

In answer to the sixth cross-interrogatory, the same witness said:

"A. I have not destroyed the original message received in this case. It is not true that we have a rule in our office to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule. This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, *as the original message is the one attached hereto;* it has not been destroyed. The message attached has not been prepared." (Rec., p. 88.)

Counsel for Baker objected to the introductory question leading to the foregoing questions and answers "on "the ground that the witness is not competent to answer "unless the question is clearly intended for the purpose "of showing that the files of the office showed a telegram "on file addressed in the manner indicated by the ques- "tion." (Rec., p. 78.)

This is the whole scope of the objection, and the answers prove conclusively that Defendant's Exhibit A was

not only on file in the office, but was the telegram received from the Eastern Telegraph Company, and the only one received from that company of that character and transmitted to Seattle.

Edward Chambers, manager of the Penzance office of the Western Union Telegraph Company, testified in his deposition, *without objection*, in answer to question six:

"A. The Western Union Telegraph Company received at Penzance from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to 'Barker.' (Rec., p. 92.)

In answer to question seven, the same witness said:

"A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission." (Rec., p. 93.)

The witness further said:

"Q. If you have the original message, delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked 'Exhibit A.' "

"A. I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me, marked 'Exhibit A,' and annexed to the deposition of George Robert Mockridge, made herein this day."

"Q. Was any message received by the Western

Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to 'Baker, Seattle,' and reading, 'Offered four pounds thousand cif 'advise accept market dull no outlet?'

"A. No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to 'Baker, Seattle,' and reading, 'Offered four pounds thousand cif advise 'accept market dull no outlet.'" (Rec., p. 94.)

"Q. State whether on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and if so, on what day the same was so transmitted."

"A. The message referred to in the sixth interrogatory, addressed 'Barker, Seattle,' was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891." (Rec., p. 95.)

"Q. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked 'Exhibit A,' addressed either to 'Barker' or 'Baker?'"

"A. No." (Rec., pp. 95–6.)

In answer to the second cross-interrogatory the witness said:

"A. I do not say that a message came over the wires addressed 'Baker, Seattle Washington, offered four 'pounds thousand cif advise accept market dull no out-'let.' I did not receive such message. No one received

such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received, addressed to 'Bar-'ker, Seattle,' did say 'offered four pounds thousand.' It did not say 'offered fourteen pounds thousand.' I am sure that the message was 'Barker, Seattle, offered four 'pounds thousand cif advise accept market dull no out-'let,' and not 'Baker, Seattle, offered four pounds thou-'sand' and not 'fourteen pounds.' I am so sure because I have seen and have now before me the original message itself, being Exhibit A, above referred to. By the words 'original message' I mean the message as received by our company at Penzance." (Rec., p. 97.)

In answer to question five, the witness said:

"A. The message called 'original message,' marked 'Exhibit A,' and annexed to the deposition of the said George Robert Mockridge, is not known as 'eleven,' but as number 'seven,' and is the message received. There has been no change in it since it was received. I did not send the original message out of the office. The said George Robert Mockridge did—and attached it to his interrogatory. The original message is attached to the deposition, and not a copy thereof." (Rec., p. 99.)

If the language of these witnesses is not testimony to the effect that Defendant's Exhibit A is the original message received from the Eastern Telegraph Company and transmitted to Seattle, then human language fails to express such testimony. It could not be stronger or more direct. And with this testimony before the Court and jury, the Court instructed the jury that "the law presumes

" that the responsibility for such error rests with that " company."

IV.

The Court erred in the following instruction:

" The Court directs your attention to the testimony " given by the depositions of Michael J. O'Leary and " G. R. Mockridge and Edward Chambers, and instructs " you that neither one of the said witnesses are shown to " be competent to testify as to the manner in which the " telegraphic message in question was transmitted over " the wire between any points or received at any point " on its route. These witnesses do testify to facts which " are proper to be considered in this case bearing on the " question as to whether the message was properly re- " ceived, or properly delivered, I should say, to this com- " pany.

" They show what was on file at the different offices, at " Penzance and New York, but the point of this in- " struction is that they are not good witnesses to prove " the condition in which the message came to the office " at Penzance; they are giving, not the best evidence, " but secondary evidence. They can only testify as to " what some other person has placed in the records in " their office, or has said about the matter; and the law " requires that the witnesses who made those reports to " these witnesses should give his testimony under oath " the same as other witnesses in order to make it of the " same character and degree of credibility and reliability " as the other testimony in the case. Because they are " repeating to us here unsworn testimony is why I in- " struct you their testimony is not good to prove the fact

" in the case as to the condition of the message when " transmitted from Porthcurno to Penzance.

" So far as the contents and address of the said mes- " sage are concerned, the legal effect of the testimony of " the two witnesses residing in Penzance is only that the " message as recorded in the Penzance office was as " shown by the copy attached to said deposition, and the " same is true as to the witness O'Leary, the legal effect " of his testimony upon that subject being only that the " message on file in the office in New York was as shown " by the copy annexed to his deposition." (Rec., p. 137.)

It appears that the Court in the instruction last above quoted to the jury indulged in other presumptions in no way warranted by the Record. Why are not the witnesses competent? They are presumed to be competent witnesses unless the contrary is shown; and if incompetent, they would not be allowed to testify. They are competent upon the ground of the objection made by Baker in the Court below, because they do prove what was on file in the office at Penzance, and they prove more: that the same paper that was on file in the office at Penzance was the original message received from the Eastern Telegraph Company.

The instruction is also erroneous in stating that all the testimony of Mockridge and Chambers shows, was that this telegram (Defendant's Exhibit A) was on file in the office at Penzance. The positive testimony of both shows, to be sure, that it was on file as the original telegram should be, and it shows also that the identical message on file was the original received from the Eastern Telegraph

Company. They are not giving secondary evidence. They both testify to their positive knowledge of the facts. There is no proof in this case that any other person had anything to do with the reception of this message from the Eastern Telegraph Company. There is no testimony that any other person had anything to do with transmitting it. To enable the Court to charge the jury as it did upon this subject the Court must indulge in the legal presumption that nobody but an active operator could know the contents of a message received from another telegraph office; and, further, that no one except a professional operator, actively engaged in that business at the time, could receive or send a message by telegraph; whereas, as a matter of fact, superintendents and managers understand telegraphic signals as well as operators, because they have been operators, and can receive or send messages as well as active operators, and often do it.

Whether we are right in this position or not, the testimony of Mockridge and Chambers is positive—one that he received the message and transmitted it to New York, and the other that he knew of its being received; knew that it was the original message, and knew that it was transmitted to New York.

Now, to say that this is hearsay, is to contradict flatly the testimony. It is not hearsay; it is direct, positive evidence that the Court had no right to reject, and which should have been submitted to the jury instead of being taken practically from them by the decision of the Court that the witnesses were not competent to prove the facts that they had positively sworn to.

V.

The Court erred in charging the jury "if you find "that there is a fair preponderance of the evidence "proving or tending to prove that there was a mistake "in the address of the message and that the message as "received by the defendant at Seattle was addressed in "a different way than when it was sent from Sydney, "and by reason of this error there was a mis-delivery of "the message and delay in delivering it to the plaintiff, "and that by reason of that delay the plaintiff lost an "opportunity to sell the cargo of lumber referred to in "said message to a customer who was ready to buy and "pay for it, and that by losing that opportunity of sale "he made a loss on the cargo by reason of the decline in "the market, and that the defendant has not shown by "competent evidence that the error was not committed "by the defendant or any of its servants or employees, "then your verdict should be for the plaintiff for the "amount of his loss, if you find all of these facts from the "evidence." (Rec., pp. 137–8.)

There are two errors in this instruction. First, the law requires the plaintiff in an action on a contract with a telegraph company, the same as in any action on a contract, to prove his case. If, instead of receiving this message from the Eastern Telegraph Company at Penzance, it had been deposited by an individual, would not the law require proof that the individual deposited the message, and of its contents, and the error committed in its transmission?

Under the contract in this case, the Eastern Telegraph

Company is simply an agent of the sender of the message to deposit the telegram with this company, and the precise telegram deposited should be proved as in any other case.

But the error does not end here. As before stated, the defendant had proved the contents of the message deposited at Penzance by two witnesses, positively. The instruction ignores this testimony entirely. And there can be no doubt of the intention of the Court to ignore it in consequence of previous and subsequent rulings that it was incompetent for all purposes except to prove that the message was on file at Penzance as sent to Seattle.

VI.

The Court erred in giving the following instruction to the jury:

"In determining whether the defendant company has "been negligent, it is your duty to give consideration to "all the facts that are proven, both as to the conduct of "the defendant and its employees and representatives "and all of the other actors in this transaction; Mr. "Baker's failure to register a cable address by which he "expected to receive messages before this transaction is "one of the circumstances which you are to take into "account because if he had done that it might have "avoided this error. I do not say that it would and I "am not saying that you should find that it did, but it is "one of the circumstances that a fair man would take "into account and give consideration to before he would "come to an ultimate decision on the point of whether "the telegraph company was negligent or not." (Rec., pp. 138–9.)

The Court should have instructed the jury that Baker's failure to register a cable address by which he expected to receive messages before the transaction referred to was negligence, and that he could not recover if the jury believed he had neglected to register such an address.

This was the first cable message that Baker & Co. had ever received by the Western Union Telegraph Company from Sydney or elsewhere, so far as the testimony shows. Baker in his sworn complaint states that after the shipment of said lumber he notified B. Singer at Sydney by telegram by the defendant's lines, but in his testimony he admits that he did not send that or any other message over the defendant's wires (Rec., pp. 43–44), and that he had no cable address registered with the defendant (Rec., p. 75).

Was it reasonable to expect a company to know anything about the cable address "Baker" when he had registered no address, had sent no previous message over its line, and in no way given it notice that he was expecting any cablegram at any time?

The Court below from its instructions seemed to be under the impression that the similarity between the names of Baker and Barker tended to produce the mistake. This is an entire error, because in cable addresses the name is purely arbitrary and signifies nothing except a designation of something that may be entirely different in sound and orthography. The rules and regulations of the company authorize the registration of a name that represents the name of a firm and its full address. This is simply to save money to the patrons of the com-

pany, who would otherwise be required to pay for the full name and the full address.

That the plaintiff was familiar with this rule of the company is evident from his testimony where he explains that "Ritual" is "B. Singer & Company," that is that it was the cable address of B. Singer & Company, registered in Sydney, and where he further states "That it "is customary that a concern has a registered cable ad- "dress; if they have a long name, they will have it "registered—it saves expense," and where the plaintiff further swears that he had no cable address with the defendant in Seattle. (Rec., p. 75.)

The registration is without fee, and solely to save money to the patrons of the company. Under such circumstances, it was negligence in the plaintiff to neglect to register such an address because the word "Baker" as a cable address signified nothing to the company unless some firm or person was registered as "Baker," and there being no such registry, it was simply meaningless. If it had been sent "Baker" it was still meaningless to the company, but it was not. And "Barker" was equally so, except that the employees of the company knew a man of that name, of large means, connected with the bank, delivered it to him, and they thought, and honestly thought, it properly delivered.

VII.

The Court devotes some space as to the legibility of the message as delivered, and then says:

"The testimony does not show what the condition of "the writing was any further than there is testimony of

" a witness that the message he sent was directed to " Baker, and there is a copy of a dispatch introduced in " evidence which bears upon it an endorsement that " would be legal evidence of an admission against the " telegraph company that received it for transmission " (that is, the Eastern Telegraph Company)—an admis- " sion that that was received addressed to Baker, and " there is an absence of testimony tending to prove that " the writing delivered in Sydney was not legibly writ- " ten."

The Court erred in charging the jury: "Now, from " all that, a presumption naturally arises that the message " was started right; that Mr. Baker's agent in Sydney or " his correspondent there delivered a message addressed " to Baker, and not one that might have been mistaken " as being addressed to Barker, but the evidence is en- " tirely silent as to whether the error occurred in the " office of transmittal—there is nothing to show that it " occurred there, so that this question of the legibility of " the writing can have but very little effect in aiding you " in arriving at a decision." (Rec., pp. 139, 140.)

It is submitted that there is nothing in the facts recited in this instruction that created any presumption whatever that the message was started right. There is testimony tending to show that it was started right, but there is no presumption whatever; and when the Court says that the evidence is entirely silent as to whether the error occurred in the office of transmittal (meaning at Sydney), it should have said that there is evidence tending to prove that it did occur somewhere on the line before reaching Penzance, because it reached Penzance "Barker" and not

"Baker," and that testimony should have been left to the jury instead of being withdrawn from it, or so qualified as to be equivalent to its withdrawal.

VIII.

The Court erred in charging the jury:

"If this message had come to the Seattle office addressed "to Abraham Barker and it had been delivered at Mr. "Barker's place of business or his residence to a mature "and prudent person—an adult, prudent person there, "according to the usual custom of business, it would be "hard to blame the company for negligence in so deliv- "ering it, but a message simply directed to Barker, unless "there was some previous understanding between Mr. "Barker and the telegraph company by his having "registered that address in the company's office, accord- "ing to their rules for registering, would not give them "the right to send that message and drop it down on his "desk or leave it in the hands of some other person "without some inquiry as to whether he was the proper "Barker that was entitled to receive it." (Rec., p. 140.)

It is submitted that the evidence shows that Abraham Barker was the only person in the judgment of the employees of the company for whom the message could be intended, and therefore it was precisely the same as though it had been addressed to Abraham Barker. And it is submitted that the message was not dropped down upon Mr. Barker's desk, that the evidence shows that it was receipted for by the president of the bank, and the agents of the company were not informed that Mr. Barker was out of town, and they did expect (as the

Court says they had a right to expect) that the message had been properly delivered, and as soon as they learned the contrary from the Eastern Telegraph Company at Sydney they delivered the message to Mr. Baker.

It is somewhat peculiar that the Court in these instructions assumes that the company ought to have done for Mr. Baker precisely what it says it ought not to have done for Mr. Barker, and this when the testimony in the case fully shows that there were large numbers of firms engaged in shipping lumber to Australia at Seattle. Assuming that the message discloses (which it is submitted it does not) the nature of the transaction, it still might apply to many persons besides Baker, and yet these instructions throughout charge the company with the duty of hunting up Baker and delivering the message to him without any guide whatever.

IX.

It is submitted that the Court erred in charging the jury:

"If the error was on the part of the operator who re-
"ceived the message in the Penzance office, then it
"would be negligence for which this defendant and
"company is liable." (Rec., p. 142.)

This instruction is faulty in two particulars. First, as the company under the contract is only liable for wilful or gross negligence, it would not be liable for a mistake on the part of the operator at Penzance; and, second, there is no evidence, not the slightest, that any error was committed on the part of the operator who received the message in the Penzance office, and there is positive tes-

timony that the message was received from the Eastern Telegraph Company precisely as it was transmitted to Seattle.

X.

The Court charged the jury:

"A party doing business with a telegraph company, "and who is receiving messages under an abbreviated or "assumed name owes it to the telegraph company that "he advise it that he is so doing and that he expects "messages so addressed, in order that no mistake may be "made by such telegraph company in the delivery of "such message.

"The telegraph company is bound to deliver messages "as they are addressed, and have no right to disclose the "contents of any message to any person other than the "one addressed. If the defendant received the message "in question addressed to 'Barker,' then when it had "reached its destination it had no right to disclose the "contents to any person of the name of 'Baker,' so long "as it was not informed that the message was intended "for 'Baker' and not for 'Barker.' "

"It is the duty of any person sending a telegram to "another to make the address so plain as that the tele-"graph company may in the exercise of ordinary care "and diligence, deliver the same without the necessity "of making inquiry." (Rec., p. 142.)

This is good law, but the other instructions heretofore quoted, and others in the record, directly contradict it. If a party doing business under an abbreviated or assumed name owes it to the telegraph company that he advise it that he is so doing business and that he expects

messages so addressed, in order that no mistake may be made in the delivery of the message, then, if he does not so advise it, it would follow as a matter of law and common sense that the company would not be responsible for not delivering such messages.

But the general scope of the instructions in this case is that while the party owes that to the telegraph company, it makes no difference whether he performs his obligation or not. He may be negligent, he may neglect to give the company any means by which it can deliver messages, he may utterly ignore the company's rights, and yet the company is bound to make the losses caused by his negligence good to him.

XI.

The Court charged the jury:

"The defendant is not bound to show how or where "the mistake occurred. If it shows that it did not occur "on its line or by its employees, that is sufficient, and it "is not required to go further and show how or where it "did occur." (Rec., pp. 142, 143.)

It is submitted that the defendant did show at the trial by the depositions of Mockridge and Chambers, conclusively, that the mistake did not occur on the line of the defendant, and that testimony should have been left to the jury without the qualifications attached to it by the Court.

XII.

The Court charged the jury: "The burden is not on "the plaintiff to prove where the error occurred in order "to have a right to recover from the defendant. The

" defendant is obliged to prove that the error did not " occur in any of its offices, but it is not obliged to go " further than that and prove where the error was com- " mitted." (Rec., p. 143.)

We insist that the burden of proof was on the plaintiff to prove that the error occurred on the lines of the defendant, not the precise point, but somewhere on the lines; and we insist further that the defendant did prove that the error did not occur in any of its offices, or on its lines.

XIII.

The Court charged the jury: " I want the jury to un- " derstand by what I have said that the testimony of the " witnesses who have given their depositions here, Mr. " Chambers and Mr. Mockridge, is the best evidence ob- " tainable, as to what the files in the office at Penzance " show was received as the message, and it is competent " for that purpose, as I have said, that it is competent to " be considered as bearing on the question, but it is not " the best evidence as to how the message was transmitted " from Prothcurno." (Rec., pp. 146–7.)

This record was kept in the ordinary transaction of business. The witnesses were superintendent and manager of the defendant, and taking their testimony as to the reception and transmission of the message and their general connection with the business of the office generally and at the time of the reception of this message, the testimony would be competent as tending to establish the fact of the precise message received and transmitted.

Chateaugay Ore & I. Co. vs. *Blake*, 144 U. S., 476.

Seventh Day Advent. Pub. Assn. vs. *Fischer*, 54 N. W. Rep., 759.

Montague vs. *Dugan*, 68 Mich., 100.

Ganther vs. *James Jenks & Co.*, 43 N. W. Rep., 601.

Mo. Pac. Ry. Co. vs. *Gernon et al.*, 19 S. W. Rep., 461.

The witnesses testified positively. There is nothing in this record tending to show that they testified from other than their personal knowledge or from hearsay. There can be no mistake about their statements, because they are contained in depositions; and having testified positively, and nothing appearing in the record to show that they were testifying from hearsay, the Court is bound to receive their statements as evidence.

Atlanta Glass Co. vs. *Noizet*, 13 S. E. Rep., 833.

In this case the Court said: "Taking the whole of the "witness' testimony given as it appears in this record, it "would seem that he was testifying of his own knowl- "edge. However that may be, it does not appear to us "affirmatively that he was testifying from hearsay; and, "unless it should so appear, we could not hold that the "Court erred in allowing the testimony."

XIV.

The Court erred in permitting the witness Baker to testify as to conversations with Brown, the manager of the company at Seattle, against the objection of the defendant, for the reason that the company could not be bound by the admissions or statements of its employees

as to the reception or delivery of the message or non-delivery, after the event. (Rec., p. 37.)

XV.

The Court erred in admitting the statements of the witness Baker in regard to the declarations and statements of O'Leary in New York, made long subsequent to the first of October, 1891, the said O'Leary's declarations and statements being in no way binding upon the telegraph company as to what occurred after the first of October, 1891, the date when the message was sent. (Rec., p. 38).

XVI.

The Court erred in refusing to give the instruction requested by plaintiff in error "that there is nothing on "the face of this telegram which would indicate to a "person not acquainted with the transaction that it re-"fers to a sale of lumber, or that it was intended to be "delivered to the plaintiff in this action. In cases where "a telegram is so written that its contents convey no "meaning to the agents of the telegraph company into "whose hands it may come for transmission and delivery, "so that its importance may be fully understood, the "sender takes the risk of the proper transmission and "delivery of the message, and the company would be "liable for but nominal damages for any error which might "occur after it came into its hands." (Rec., p. 177.)

There was nothing on the face of this message that would indicate to a person not conversant with the business and parties that any special damage would arise from its non-delivery. Nor is there anything on the face of

the message that indicates in any degree or to any extent for whom the message was intended.

In an action founded upon a contract, only such damages can be recovered as are the natural and proximate consequence of its breach, or such as the law supposes the parties to it would have apprehended as following upon its violation, if at the time they made it they had bestowed proper attention upon the subject and had full knowledge of all the facts.

Sutherland on Damages, 2d Ed., 92, and cases cited.

Wood's Mayne on Damages, p. 67, and cases there cited.

In *Western Union Telegraph Co.* vs. *Hall*, 124 U. S. Rep., 444, it was held: The damages to be recovered in an action against a telegraph company for negligent delay in transmitting a message respecting a contract for the purchase or sale of property are, by analogy, with the settled rules and actions between the parties to such contracts, only such as the parties must or would have contemplated in making the contract, and such as naturally flow from the breach of its performance, and are ordinarily measured by actual losses based upon changes in the market value of the property.

In *Candee* vs. *Western Union Telegraph Co.*, 34 Wis., 471, it was held that "The measure of damages for a breach "of such a contract is the loss which may be fairly "considered as naturally arising from such breach, or "which may reasonably be supposed to have been in "contemplation of both parties when they made the con- "tract as the probable result of the breach thereof."

In the case of *Hadley* vs. *Baxendale*, 9th Exch., 345 (a leading case on both sides of the Atlantic, approved and followed by the Supreme Court of the United States in *Western Union Telegraph Co.* vs. *Hall*, *supra*, and in *Howard* vs. *Stillwell Co.*, 139 U. S., 199, and in *Primrose* vs. *Western Union Telegraph Co.*, 154 U. S., p. 1), the Court held:

" Where two parties have made a contract which one of " them has broken, the damages which the other party " ought to receive in respect of such breach of contract, " should be such as may fairly and reasonably be con- " sidered either arising naturally, i. e., according to the " usual course of things, from such breach of the con- " tract itself, or such as may reasonably be supposed to " have been in contemplation of both parties at the time " they made the contract as the probable result of the " breach of it."

In that case the plaintiffs, who were the owners of a mill, sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them, and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry if necessary must be made to hasten its delivery; and the delivery of the broken shaft to the consignee to whom it had been sent by the plaintiffs as a pattern by which to make a new shaft, was delayed for an unreasonable time, in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have had it, and they were, consequently, unable to work their mill from want of their new shaft, and

thereby incurred loss of profits. Held: that under the circumstances such loss could not be recovered in an action against the defendants as common carriers.

In the light of these authorities there is nothing in the telegram that gave to the defendant notice of any special damage that would be caused by its non-delivery. Nor was there anything that indicated in any way to whom the dispatch was to be delivered. It was apparently a cable address. The company in Seattle had no cable address of that character, and therefore the word "Baker" could have conveyed to them no information as to the person entitled to receive it, even if that word had been transmitted. When to this is added that it was transmitted "Barker," the defendant could certainly have received no intimation of the proper place of delivering the message.

The Court below was of opinion, apparently, that the message was very plain, yet it is observable that the plaintiff was at the trouble of proving not only the words of the message, but what the message meant translated into plain language, and who the message was intended for in Seattle.

The message as sent from Sydney was as follows:

"Baker, Seattle. Offered four pounds thousand cif "advise accept market dull no outlet." (Rec., p. 63.) There was no signature to the message. A portion of the message was unquestionably cipher, and no person not acquainted with the business would have had any information whatever as to the peculiar terms of this message or would have supposed that any special damage would be occasioned by its non-delivery.

There is no pretense in this case that there was any understanding between the agent of Baker & Co. and the defendant as to the importance of the message, or any explanation whatever of its contents other than appeared upon the face of it.

It was thought by the plaintiff necessary to translate or explain the message to the Court and jury so that they would understand it.

In the deposition of Hamburger the following question and answer is contained:

"Q. If you say it was addressed 'Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet, Singer,' please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm? If you say you did get any answer, state when it was and what was the answer.

"A. The cablegram was meant to convey that we had received an offer of four pounds per thousand feet cost, insurance and freight paid by consignor, and advising Baker & Co. to accept, as the market was dull and there was no sale for lumber." (Rec., p. 63.)

If it was necessary to translate and explain this dispatch to the Court and jury to enable them to comprehend its terms and understand its meaning, why was it not equally necessary to explain its terms, its meaning to the agents of the telegraph company, if the company was to be held responsible for its non-delivery or erroneous delivery?

If the company is liable at all it is upon the face of this message, because there is not a scintilla of testimony

tending to show that any explanation was made to any of the agents of the company as to the real importance of the dispatch, nor was any explanation made to the company of what person or firm the message was intended for.

XVII.

The loss in this case was occasioned by the negligence of the plaintiff himself in causing a telegram to be sent to H. W. Baker & Co. so many thousand miles and through so many relays, addressed only to "Baker," he having no cable address filed in the defendant's office at Seattle.

It is not contributory negligence because there is no evidence that the company was negligent at all. The loss was in consequence of the negligence of the plaintiff and attributable to no other cause, and, of course, if this is the case, he cannot recover.

If the plaintiff's own negligence was an immediate and principal cause of the injury, without which it probably would not have occurred, it is certain he cannot recover damages.

2 Parsons on Contracts, 7th ed., 817.
I. & C. R. R. Co. vs. *Rutherford*, 29 Ind., 82.
Todd vs. *Old Colony R. R. Co.*, 3 Allen, 18.
Transportation Co. vs. *Dower*, 11 Wall., 129.
R. R. Co. vs. *Jones*, 95 U. S., 442.

In the last case cited Mr. Justice Swayne, speaking for the whole Court, said: "Negligence is the failure to do "what a reasonable and prudent person would ordinarily "have done under the circumstances of the situation, or do-

" ing what such a person, under the existing circumstances, " would not have done. The essence of the fault may " lie in omission or commission. The duty is dictated " and measured by the exigencies of the occasion. One " who by his negligence has brought an injury upon " himself cannot recover damages for it. Such is the " rule of the civil and common law. The plaintiff in " such cases is entitled to no relief."

Measured by this rule, what was the plain duty of the plaintiff? He had shipped lumber to Sydney, he had contracted with his agent there to keep him advised by telegraph of the reception, prices and sale of the lumber, and other matters connected with the business. He failed utterly to register any address with the company at Seattle; took no step whatever to advise the company or any of its agents that he had made such shipment or was expecting such information, and then, by his direction, presumably, because Singer & Co. were but his agents, had the message sent to what was apparently a cable address.

This was an omission to do what a reasonable and prudent person would ordinarily have done, and was negligence.

Under the circumstances and testimony in this case, the Court erred in not giving the instruction asked for by the plaintiff in error "that there is nothing on the " face of this telegram which would indicate to a person " not acquainted with the transaction that it refers to a " sale of lumber, or that it was intended to be delivered " to the plaintiff in this action" (Rec., p. 155); and also erred in refusing to give the instruction asked for by the

plaintiff in error as follows: "The jury is instructed that "from all the evidence in this case the defendant does "not appear to have been guilty of negligence either in "the receipt, transmission or delivery of the message "which it received, and therefore your verdict must be "for the defendant." (Rec., p. 157.)

XVIII.

The contract in this case was made at Penzance, England, to be executed partly in Great Britain and partly in the United States. It is foreign and interstate commerce, and in no way a local question or subject to local laws or decisions, but is a question of general commercial law to which the United States Courts apply the Federal rather than State decisions.

The Supreme Court of the United States has repeatedly held that the question of the validity of contracts limiting the liabilities of common carriers is not a local question, and by a parity of reasoning the same rule applies to telegraph companies in the transmission of international messages.

B. & O. R. R. Co. vs. *Baugh*, 140 U. S., 101.
Merrick vs. *Michigan Central R. R. Co.*, 107 U. S., 102.
Welton vs. *State of Missouri*, 91 U. S., 275.
Hall vs. *De Cuir*, 95 U. S., 485.
County of Mobile vs. *Kimball*, 102 U. S., 691.
Primrose vs. *Western Union Telegraph Co., supra.*
Covington Bridge Co. vs. *Kentucky*, 154 U. S., 204.

We have not noticed all the exceptions taken to the

ruling of the Court during the progress of the trial, nor all of the exceptions taken to the charge of the Court. We have noticed enough, in our judgment, to determine this case and to determine it according to our contention, and we submit that the cause should be reversed, and the case remanded to the Circuit Court with instructions to dismiss the complaint.

Respectfully submitted,

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R. B. CARPENTER,
Attorneys for Plaintiff in Error.

No. 391.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error.*

vs.

H. W. BAKER, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

HAROLD PRESTON,
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L. C. GILMAN,
Attorneys for Defendant in Error.

SEATTLE, WASHINGTON.

LOWMAN & HANFORD CO., SEATTLE

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UNITED STATES

CIRCUIT COURT OF APPEALS

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THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error*, vs. H. W. BAKER, *Defendant in Error.*	No. 391.

BRIEF OF DEFENDANT IN ERROR.

OBJECTION TO CONSIDERATION OF ERRORS ASSIGNED.

Comes now the defendant in error, H. W. Baker, and hereby objects to the consideration by the court of the alleged errors assigned herein by the plaintiff in error, for that

1. None of the alleged errors claimed and assigned by the plaintiff in error herein were properly taken, preserved or assigned in the Circuit Court of the United States for the District of Washington or in this court.

2. No proper, sufficient or legal bill of exceptions was certified by the Circuit Court of the United States

for the District of Washington, or by any judge thereof, and the record herein contains no proper, sufficient or legal bill of exceptions.

3. No proper, sufficient or legal assignment of errors was filed in said Circuit Court of the United States for the District of Washington, and no proper, legal or sufficient assignment of errors appears in the record herein.

These objections are based upon the record herein on file in this court.

HAROLD PRESTON,
E. M. CARR and
L. C. GILMAN,
Attorneys for Defendant in Error.

ARGUMENT ON OBJECTIONS.

I.

The only errors claimed to be assigned herein are based upon alleged exceptions taken by the plaintiff in error to instructions given by the court to the jury, and refusals by the court to give certain instructions asked by the plaintiff in error. (Printed Record, pp. 168-180.) None of these exceptions were properly taken, and therefore no error has been properly preserved, for the reason that all exceptions to instructions and refusals to instruct were taken after the court had concluded its charge to the jury, and *after the jury had retired to their room to deliberate upon their verdict.* This appears affirmatively from the bill of exceptions. (See Printed Record, p. 161.) Exceptions to instructions and refusals

to instruct thus taken are of no avail, and therefore none of the alleged errors assigned can be considered by this court. This question is settled not only by the decision of this court, but by repeated and uniform decisions of the Circuit Courts of Appeal of other circuits and of the Supreme Court of the United States.

Bank vs. McGraw, 76 Fed. 930-935; 22 C. C. A. 622.

It is true that there appears in the record an attempted excuse for thus taking the exceptions, in the form of a statement by the court that it refuses in all cases to allow exceptions to be taken in the presence of the jury; but it also appears that the plaintiff in error made no request of the court to be permitted to take its exceptions to the charge at the proper time or in the proper manner. Having made no effort to protect its rights in this respect, plaintiff in error certainly will not be permitted to complain in this case that the court in other cases has refused to allow exceptions to be properly taken and preserved. No good reason is shown for a departure from a rule which this court declared in *Bank vs. McGraw, supra*, to be "absolutely essential to the proper and intelligent administration of justice." We submit that this question alone disposes of the entire assignment of errors made by the plaintiff in error. There is before the court nothing for consideration but the pleadings, the sufficiency of which have never been questioned.

II.

The so-called bill of exceptions (which may be found in the Printed Record, pp. 24 to 161 inclusive) is so

utterly defective and insufficient in form that no error can be predicated upon any of the exceptions therein set forth. It opens with the statement that the case came on for trial; then follows a statement that certain witnesses were called and sworn, with a transcript of the testimony of each witness; the objections by counsel to the admission of evidence, the rulings of the court thereon, and exceptions taken by counsel thereto, a statement that the testimony closed, a transcript *in full* of the charge of the court, followed by the exceptions taken to instructions and refusals to instruct. It is nothing more nor less than a transcript of the stenographer's notes of the trial, and is without the orderly and systematic arrangement necessary in a proper and sufficient bill of exceptions. As before stated, the only error claimed is the act of the court in giving certain instructions and refusing other instructions requested by plaintiff in error. None of these exceptions taken to instructions or refusals to instruct are pointed by any evidence showing the applicability of such instructions. Should this court undertake to consider any particular assignment of error made and to determine whether any instruction given was improperly given, or instruction refused was improperly refused, it will find nothing in the assignment itself or in the exception upon which it is based as a guide from which the court can say whether the particular instruction given or refused was in any way germane to the evidence before the jury. In order to reach a determination as to the correctness of the action of the lower court as to any question raised by the bill of exceptions or assignment of errors, this court would be compelled for itself to search through the en-

tire record for that particular evidence to which the instruction under consideration is applicable. This the court will not do. A bill of exceptions identical in form with that in the case at bar was before the Circuit Court of Appeals of the Fifth Circuit, and that court said in the course of its opinion refusing to consider the assignments of error:

"It" (the bill of exceptions) "purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction without any special local relation to any of the exceptions on which the eighty-seven assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. * * * * The document referred to cannot be taken as a bill of exceptions."

City vs. Baer, 66 Fed. 440-445; 13 C. C. A. 572.
Phosphate Co. vs. Cummer, 60 Fed. 873; 9 C. C. A. 279.
Improvement Co. vs. Frari, 58 Fed. 171; 7 C. C. A. 149.
The Francis Wright, 105 U. S. 381.
Lincoln vs. Claflin, 7 Wall. 132.

Should the court give consideration to the bill of exceptions in question it would take upon itself the burden of searching the record to find the evidence, if any there be, applying to each particular exception. We submit that this is the province of counsel, not of the court; and if counsel neglect to point exceptions with the necessary evidence, the court should ignore them.

The position which we contend the court should assume relative to such a bill of exceptions, is well stated by the Supreme Court of the District of Columbia as follows:

"The court will not regard itself under any obligation to search through a mass of testimony inserted in a bill of exceptions, with a large amount of irrelevant matter and formal statements, to ascertain what there is that bears upon some specified ruling of the trial judge."

Railroad Co. vs. Fitzgerald, (*D. C. App.*) *22 Wash. L. Rep. 217.*
Railroad Co. vs. Walker, *Id. 223.*

While the various exceptions relied upon by plaintiff in error are all embraced in one document termed a bill of exceptions, we submit that each exception really constitutes a bill of exceptions by itself; that each exception must stand alone and be considered upon the matter and that only contained in itself. It is possible that matter outside of the exception itself might be made a part of it by proper reference; but the court is not bound to look beyond the particular matter incorporated in the exception either directly or by proper refusal to determine whether or not it is well taken; and it has been established by repeated rulings of the national courts that every bill of exceptions must be considered as presenting a distinct and substantial case, and it is on the evidence stated in itself alone that the court is to decide; and when exception is taken to instructions of the court given or refused, such exception must be accompanied by a distinct statement of the testimony given or offered which raises the question to which the exceptions apply.

Insurance Co. vs. Raddin, 120 U. S. 183-195.
Jones vs. Buckell, 104 U. S. 554-556.
Worthington vs. Mason, 101 U. S. 149.
Dunlop vs. Munroe, 7 Cranch 242.

Considering, therefore, that each of these exceptions constitutes by itself a separate bill and must stand or fall by the matter contained therein, it is apparent that no one of the exceptions can be considered by the court, as there is no evidence incorporated therein, either directly or by proper reference, from which the court can determine whether the instruction complained of was proper to be given or refused; and the court can only determine the propriety of the instruction by itself examining the entire mass of testimony included in the bill of exceptions in the order of its introduction, and covering above one hundred pages of the printed record, and segregating therefrom, the evidence, if any, applicable to any particular instruction.

III.

The assignment of errors is as defective as the bill of exceptions in the particulars above enumerated. The sufficiency of such an assignment of errors has been twice before the Circuit Court of Appeals of the Fourth Circuit during the present year, and in each case that court has refused to consider errors so assigned.

Newman vs. Steel & Iron Co., 80 Fed. 228-234.
Surety Co. vs. Schwerin, 80 Fed. 638.

In the first case above cited the court says:

"So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to

the evidence that shows the relevancy of the propositions of law propounded by such instructions, and we therefore presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them."

And in the later case the court says:

"We are unable to consider the point suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error."

A reference to the assignment of errors herein (pages 168 to 180 of the Printed Record) discloses that in no one of the assignments, based as all are upon instructions given and refused, is contained any allusion to the evidence, and the court will therefore presume that as to instructions given the court had the evidence before it making such instructions proper, and as to instructions refused there was no evidence upon which the court could base the instructions asked for. It should be noted in this connection that the rules of the Circuit Court of Appeals of the Fourth Circuit relative to bills of exceptions and assignments of error are identical with those of this court. (See Compiled Rules Circuit Court of Appeals, 78 Fed., pages XXXI, *et seq.;* Rules Fourth Circuit, 78 Fed., page LVI; Rules Ninth Circuit, 78 Fed., page CII.)

We therefore submit that none of the errors assigned can be considered by this court, that the same should be ignored and the judgment of the lower court affirmed.

IV.

We also submit for the consideration of the court that the brief filed by the plaintiff in error does not conform to rule 24 of this court. There is no specification of errors distinct and separate from the argument as is contemplated by that rule, but the specification of errors and argument are so intermingled as to render it impossible from the specification made to determine exactly what portion of the errors assigned are relied upon in this court. While the general statement is made in the brief that reliance is had upon all the errors specified, yet the portions of the charge specified as errors are not set out *totidem verbis* as required by the rule.

Without waiving the objections hereinbefore made to the consideration of the bill of exceptions, assignment of errors and brief, the defendant submits the following brief upon the merits:

STATEMENT OF THE CASE.

The statement of the case made in the brief of the plaintiff in error is in the main correct; but in order to enable the court to have a clearer understanding of the controversy, it should be supplemented by a fuller statement of the facts.

In the year 1891 the plaintiff with certain associates, doing business under the firm name of H. W. Baker & Co., were engaged in the business of general commission merchants and brokers at the city of Seattle. The members of the firm and their place of business were

well known to the local managers and employes of the plaintiff in error, by reason of the fact that the firm had dealt with the telegraph company extensively for two or three years prior to 1891. (Printed Record, pp. 28-124.) In September, 1891, H. W. Baker & Co. consigned to B. Singer & Co. at Sydney, Australia, the ship "W. H. Lincoln" with a cargo of about one million and a quarter feet of lumber, the cargo to be sold by Singer & Co. for the account of H. W. Baker & Co. Subsequent to the sailing of the ship and prior to her arrival at Sydney, Mr. Baker learned from market reports and otherwise that the lumber market in Australia was considerably depressed; that the price of lumber was falling, and that he was likely to suffer a loss on this consignment, and he was therefore anxious to sell at the earliest opportunity. On the first day of October, 1891, B. Singer & Co. sent the following cable message to H. W. Baker & Co.:

"To Baker, Seattle: Offered four pounds thousand cif. Advise accept. Market dull. No outlet."

This message was transmitted over the government lines from Sydney over various cable lines to Pothcurno, from Pothcurno to Penzance, England, and from Penzance to New York, and from New York to Seattle. The line over which the message came from Penzance to Seattle was operated entirely by the Western Union Telegraph Co. From Pothcurno to Penzance the line was operated jointly by the Western Union Telegraph Co. and the Eastern Telegraph Co. The plaintiff in error therefore had control of the message from the time it reached Pothcurno. At some time while the message was en route the address was changed from "Baker" to

"Barker," and was taken from the wires at Seattle "Barker" instead of "Baker," and was delivered by the employes of the plaintiff in error at the place of business of one Abram Barker residing at Seattle. At the time of the delivery said Barker was absent from the city. The telegram was placed in his desk, and when he returned on the 8th or 9th of October he opened the message and finding that it was not intended for him returned it to the telegraph company, who then delivered it to H. W. Baker & Co. The offer contained in the cablegram was an advantageous one, and considerably above the market price at the time the telegram was delivered to Baker. The market price at Sydney, as shown by the uncontradicted testimony, was £3 to £3 10s per thousand feet between the first of October, 1891, and the 9th of October, 1891, although B. Singer & Co. obtained one offer of £3 12s per thousand. An advantageous sale was therefore lost by the firm of H. W. Baker & Co. by the misdirection and misdelivery of this cablegram, as the market price continued to fall, and the lumber was finally sold for barely enough to pay expense. Subsequent to the occurrence above narrated the firm of H. W. Baker & Co. dissolved, and Mr. Baker alone succeeded to the interest of the other partners, and this action was brought by Mr. Baker to recover the damages suffered by the negligence of the telegraph company in transmitting the message incorrectly. The verdict appears to be for the difference between £4 per thousand and £3 12s per thousand, the highest offer received subsequent to the delivery of the telegram, with interest added.

POINTS AND AUTHORITIES.

I.

It is claimed by the plaintiff in error that the court erred in its charge to the jury in its classification of the action in question, in that he told the jury that the action was founded in tort. Assuming that the court was in error in so classifying the action, it is difficult to see how such error could have been in any way prejudicial, so long as the facts upon which the action was based were sufficient to entitle the plaintiff to a recovery. The jury could not be concerned in a matter of mere definition or classification. This action being at law, the pleadings and practice in the Federal Court conform to the local practice, and in the State of Washington there are no classes of actions. The law of that state makes no distinction between actions *ex delicto* and actions *ex contractu* so far as the form of action is concerned. The state statute provides: "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." (*2 Hill's Statutes & Codes of Washington, Sec. 109.*) It follows from this statute that it could make no difference in the rights of the parties whether the action be denominated as an action *ex delicto* or an action *ex contractu.* In either case the pleadings would take the same form and the evidence to support the pleadings would be identical.

We submit that the court placed this action in its proper class. The learned counsel for plaintiff in error

seems not to recognize the distinction between actions brought by the sender of a message and those brought by the receiver. Between the telegraph company and the former there exists a contract; between the company and the latter there is no contractual relation. The telegraph company owes to the receiver the duty of correct transmission and prompt delivery. A violation of this duty constitutes a tort. Mr. Thompson in his work on the Law of Electricity thus states the rule:

"If the action is brought by the *receiver* of the message it must be in *tort*, since there is no contract relation between him and the sender."

Thompson on Law of Electricity, Sec. 448.

See also—

Telegraph Co. vs. DuBois, 128 Ill. 248; 21 N. E. 4.
Telegraph Co. vs. Richman, 8 Atl. Rep. 172 (Pa.).
Telegraph Co. vs. Drybug, 35 Pa. St. 298.

A reference to paragraph eight of the complaint (Page 10 of the Printed Record) shows that the same contains apt allegations of negligence. It is claimed that the action is based on the contract set out in the record at page 191. Obviously this message cannot be the contract, as it is not the writing delivered by the sender to the telegraph company at Sydney or that received by the receiver at Seattle; it is simply a transcription of what was taken by the operator off the wires at Penzance and filed in the office of the company there. The action of the operator in taking it from the wires and in filing it was entirely disconnected with any act of either the receiver or the sender.

The Primrose case is not in point, as in that case the action was by the sender of the message, and it cannot be disputed that in all cases the relation between the sender and the company is a contractual one. In this case the Supreme Court in its opinion at page 21 hold that there is no contract between the receiver of the message and the company, as the court there says:

"Some of them were actions brought not by the sender but by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance."

That the Supreme Court in the Primrose case holds that there is a contract between the sender and the company by which both parties are bound, and that the terms of this contract are to be gathered from the message itself, cannot be doubted. It is also equally clear from the opinion that the sendee is no party to this contract. From this it would seem to follow that his action sounds in tort, and that the instruction of the court below is correct.

That the person to whom a telegram is sent has a right of action against the company for mistransmission or failure to deliver, is well settled.

Mentzer vs. Telegraph Co., 93 Iowa, 752; 48 Am. & Eng. Corp. Cas. 390.

Milliken vs. Telegraph Co., 110 N. Y. 403; 18 N. E. 251.

Telegraph Co. vs. Beringer, 84 Texas, 38; 19 S. W. 336.

Young vs. Telegraph Co., 107 N. C. 370; 3 Am. Ry. & Corp. Cas. 494.

Telegraph Co. vs. Allen, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 536.
Thompson on the Law of Electricity, Sec. 428.

While in England it has been held that the addresse of a message has no right of action against the company, yet such right of action has been sustained by all American courts before which that question has come.

II.

The rule laid down by the Circuit Court in its charge to the jury as to the degree of care required of a telegraph company in the transmission and delivery of messages does not place any too great responsibility upon the company. It is practically the same rule announced by Judge Gilbert of this court at circuit in the case of

Fleischner vs. Telegraph Co., 55 Fed. 738,

as follows:

"The weight of modern authority supports the rule that while telegraph companies are not to be held as common carriers, and therefore insurers of the safe and timely transmission of messages, yet that their obligations are to some extent analogous to those of common carriers, having their source in the public nature of the employment, the public rights conferred upon them, and the business and social necessity of the service rendered. They are therefore held to the exercise of care, the degree of which is variously expressed, but is generally declared to be in substance such care and caution as is reasonably within their power to employ. That rule has been adopted in this court in *Abraham*

vs. Telegraph Co., 23 Fed. Rep. 315, where Judge Deady held that a telegrapher is 'bound to the exercise of care and diligence adequate to the discharge of the duties thereof.'"

The idea expressed by Judges Gilbert and Deady seems to be this: That the care must be commensurate with the importance of the business the telegrapher is called upon to transact; and considering the class and importance of the business transacted by wire, it is not too much to say that a high degree of care should be exercised. Certainly it "is reasonably within their power to employ" a high degree of care.

The Fleischner case was affirmed on appeal by this court in 66 Fed. 899; 14 C. C. A., 166.

The learned counsel for the plaintiff in error claims that the court should have charged the jury that the company was bound to exercise only ordinary care. But we submit that what constitutes ordinary care is a relative question depending upon the subject matter concerning which the care is to be exercised. What would be ordinary and reasonable care in a matter of small moment might be gross carelessness in a matter of grave import. And considering the importance to the public of the correct transmission and prompt delivery of telegraphic messages, it is not too much to say that ordinary care on the part of telegraph companies must be a high degree of care, and that it is reasonably within the power of such companies to employ this degree of care. And while some of the cases may use the expression "ordinary care," the meaning of this term when used in connection with this class of busi-

ness does not differ from that used by the trial court in its charge—a "high degree of care."

The meaning of this term is well stated in Thompson on the Law of Electricity, Sec. 140:

"The degree of care which telegraph companies are bound to bestow upon the performance of their duties is variously stated. It is sometimes said that they ought to use 'a high, perhaps the very highest degree of care and diligence in their operation,' or 'exact diligence.' Other courts are satisfied with 'ordinary care and vigilance,' or 'due and reasonable care,' as stated by Bigelow, J., in an important case. Perhaps there is little if any difference in these terms as applied to cases under discussion. They all undoubtedly mean that these corporations shall use a degree of care proportionate to the hazards and possibilities of mistake in their business. As the transmission of dispatches is a most delicate operation in many particulars, ordinary diligence in the operation and management of telegraph lines would demand a degree of attention from the agents of the companies fairly denominated extraordinary when applied to other concerns of life."

A well-considered Maine case thus defines the meaning of "ordinary care" when applied to the transmission of intelligence by electricity:

"The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called 'great care.' While meaning really the same, it is variously stated by different courts

in the decisions to which we have referred,—'due and reasonable care;' 'ordinary care and vigilance;' 'reasonable and proper care;' 'reasonable degree of care and diligence;' 'care and diligence adequate to the business which they undertake;' 'with skill, with care, and with attention;' 'a high degree of responsibility.' These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature,—an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have none in the selection of its servants or agent. * * * And while we do not hold that these companies are common carriers and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill and care. * * * "

Fowler vs. Telegraph Co., 80 Me., 381; 15 Atl., 29.

In discussing this same question in an earlier case the Maine court says:

"To require a degree of care and skill commensurate with the importance of the trust reposed is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule."

Bartlett vs. Telegraph Co., 62 Me. 221.

It is thus seen that the terms "high degree of care," and "ordinary care" when considered in connection

with the subject-matter of this action are synonymous; that ordinary care for a telegraph company is a high degree of care. To say that the company is required to use a high degree of care is only another way of saying that it is bound to use ordinary care, and there was no error in the instruction given.

Telegraph Co. vs. Carew, 15 Mich. 524-533.
Tyler vs. Telegraph Co., 60 Ill. 421, 428-9.
Telegraph Co. vs. Dryburg, 35 Pa. St. 298-302.

III.

We now come to a consideration of the charge of the court as to presumption and the burden of proof; and the principle announced by the court as to where the burden rested is not only amply sustained by authority, but no authority can be found to the contrary.

In an action of this character it is only necessary for the plaintiff to show that the message was delivered to the company in one form and delivered by the company to the addressee in another form. This makes a *prima facie* case of negligence against the company, and throws upon it the burden of proof to show that it was not negligent. This rule is settled by the decisionof this court in *Telegraph vs. Cook, 61 Fed. 624-630; 9 C. C. A. 680*, in which the court says:

"The delivery of the telegram in its altered form threw the burden of proof on the company to show that it was not guilty of wilful misconduct or gross negligence in sending and delivering it in order to exonerate it from the damages actually sustained by the plaintiffs. Proof of the delivery of the telegram in its altered form

threw upon the company the burden of showing that it had exercised the degree of care and diligence required of it by the law under which it was operating; that is to say, great care and diligence."

Tyler vs. Telegraph Co., 60 Ill., 421.
Ayer vs. Telegraph Co., 79 Me., 493; 10 Atl., 495.
Bartlett vs. Telegraph Co., 62 Me., 209.
Reed vs. Telegraph Co., 37 S. W. Rep., 904.
Telegraph Co. vs. Griswold, 37 Ohio St., 313.
Telegraph Co. vs. Crall, 38 Kansas, 679; 17 Pac. 309.
Turner vs. Telegraph Co. 41 Iowa, 462.
Telegraph Co. vs. Harper, 39 S. W. Rep. 599.
Telegraph Co. vs. Tyler, 74 Ill., 168.
Rittenhouse vs. Telegraph Co., 44 N. Y., 263.
Telegraph Co. vs. Carew, 15 Mich., 533.
Pearsall vs. Telegraph Co., 124 N. Y., 256; 26 N. E. Rep., 534.
Telegraph Co. vs. Meek, 49 Ind., 53.

But it is argued that the instruction in question is erroneous in that it assumes it to have been shown by competent testimony that the message was properly delivered to the defendant company, and this brings into the discussion the responsibility of a telegraph company where it received the message, as in this instance, over connecting lines. In such a case it is not the duty of plaintiff, as suggested by counsel, to prove on which line the mistake complained of occurred. The law is that where there is a mistake in the delivery of a message which the company delivering the same received from a connecting line, it is presumed, in the

absence of evidence to the contrary, that it was correctly delivered by the connecting line, and that the error happened through the negligence of the company delivering the telegram.

Turner vs. Hawkeye Telegraph Co., 41 Iowa, 458.
La Grange vs. Telegraph Co., 25 La. Ann., 383.
Telegraph Co. vs. Howell, 95 Ga., 194; 22 S. E., 286.
Thompson on the Law of Electricity, Sec. 266.
25 Am. & Eng. Enc. of Law, page 823.

It was established by the testimony of Hamburger (Record, page 63) that the message when deposited in the telegraph office at Sydney was properly addressed "Baker." This testimony is uncontradicted. It is a conceded fact in the case that the message when it left the office of the Western Union at Seattle was erroneously addressed "Barker." The law, therefore, makes it the duty of the Western Union to show that the error did not occur on its line. The reason for the rule is obvious. All information as to where the mistake occurred is in the possession of the companies over whose lines the telegram was transmitted. The employe responsible for the mistake is necessarily under the control of one or the other of these companies. Neither the sender nor the sendee of the dispatch has or cna obtain any information as to who committed the mistake. It is easy for the defendant, who has every facility for determining whether or not the mistake was made on its line, to exculpate itself if it is innocent. To require the injured party to establish the particular act of negligence or ferret out the particular locality

where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility and enable the company to evade a just liability.

This has long been the settled rule in cases of the misdelivery or non-delivery of goods shipped over the connecting lines of common carriers.

Hutchinson on Carriers, Sections 104-721.
Laughlin vs. Ry. Co., 28 Wis., 209.
Smith vs. Ry. Co., 43 Barb., 225; Affirmed, 41 N. Y., 620.
Lin vs. Ry. Co., 10 Mo. App., 125.
Faison vs. Ry. Co., 69 Miss., 569; 13 So. Rep., 37.
Forrester vs. Ry. Co., 92 Ga., 699; 19 S. E., 811.
Beard vs. Ry. Co., 79 Iowa, 518; 44 N. W., 800.
Shriver vs. Ry. Co., 24 Minn., 506.
Dixon vs. Ry. Co., 74 N. C., 538.
Leo vs. Ry. Co., 30 Minn., 438; 15 N. W. Rep., 872.

The same reason exists for the presumption and the same rule has frequently been applied in the case of connecting lines of telegraph companies.

Telegraph Co. vs. Howell, supra.
Smith vs. Telegraph Co., 84 Texas, 359; 19 S. W., 44.
Telegraph Co. vs. Griswold, supra.
Turner vs. Telegraph Co., supra.

The court was therefore right in instructing the jury that the law presumed the defendant to be negligent until it could show to the contrary.

But it is claimed that the defendant did so show by the testimony of O'Leary, Mockbridge and Chambers, and that the court erred in its instruction to the jury as to the character and value of the testimony of these witnesses.

The argument of counsel for plaintiff in error seems to assume that the written message on file at Penzance itself came over the wire. It is a matter of common as well as of judicial knowledge that the transcription of the telegraphic signs which convey intelligence to the operator does not have any verity. That a message is written in a certain way by an operator is no proof that it came over the wires in that form. The only competent proof as to the intelligence transmitted by the usual telegraphic signs would be the testimony of the operator taking the message from the wires. The defendant in this case, instead of calling the operators at Penzance called G. R. Mockbridge, the superintendent (Record, page 77), and Chambers, manager (Record, page 92). To prove what came over the wires at New York the defendant called O'Leary (Record, page 102), the chief clerk of the cable message bureau at New York. O'Leary testifies on cross-examination that operator Delano received and operator Locke transmitted the message in question (Record, page 107). By the stipulation under which these depositions were taken (Record, page 199) the interrogatories were not settled, but either party had the right to object at the trial to the competency, relevancy or materiality of any interrogatory. When it appeared from the depositions of these witnesses that neither had shown that he was the person taking the message from the wires, and that

each was testifying solely with reference to the fact that a writing containing certain matter was on file in the office, it was entirely competent and proper that the court should confine the evidence to what was intended by these witnesses, viz: that they found a certain record in the office under their charge. Neither of them pretended in his evidence to state what was actually taken from the wires. If the operator at Penzance incorrectly transcribed the telegraphic signals indicating the word "Baker" as "Barker," of course the message on file would appear to be addressed to Barker. If anything, the court went too far in giving any effect whatever to these written messages. While the witnesses refer to these writings as "original messages," we do not presume it will be contended for a moment that they came over the wire in the form in which they were filed. The evidence of these witnesses not only does not establish that the defendant was free from negligence, but to our mind the exhibits attached to such depositions establish that the defendant was guilty of negligence, and that the mistake resulting in the change of this address from Baker to Barker occurred in the defendant's office at Penzance. We refer to the service messages which may be found at pages 193, 195 and 197 of the Printed Record. While these messages contain many abbreviations, we think they are clearly intelligible. They were exchanged between the employes of the company for the purpose of tracing the message which is the subject of this controversy. When Barker returned the telegram to the Seattle office that office sent to the Penzance office the service message appearing on page 195 of the Record, which is as follows:

"frm N Y for Seattle Wn Y 1st Barker Seattle and unk retd by Barker first Natl bank not for him W A C"

Clearly the import of this message is this: Your telegram of the first from New York for Seattle addressed to Barker has been returned by Barker of the First National Bank and is not for him. The Penzance office then sent a dispatch to Pothcurno and received from Pothcurno the dispatch appearing on page 197 of the Record, which is as follows:

"frm East ou 7-1 is to Baker Seattle pse say if still undeld East P"

The clear import of this message is: Our telegram No. 7 of the first is to Baker, Seattle. Please say if still undelivered. To this message the following response was sent from Seattle:

"frm Seattle Wn 7 1st Baker Seattle deld"

Which being interpreted means: The Seattle office reports that your telegram No. 7 of the first to Baker, Seattle, has been delivered. These exchanges between the employes of the company shows that when Barker returned the message the Seattle office notified the Penzance office that the telegram had been returned and that they did not know to whom it should be delivered; that the Penzance office immediately communicated with the Pothcurno office, receiving the response that the telegram as originally sent by that office was to Baker and not to Barker. We submit that the error is clearly located in the Penzance office, which is concededly under the control of the defendant; that the receiving operator at Penzance either incorrectly understood the telegraphic signals or incorrectly transcribed them. We

call attention to the testimony of Mockbridge (pages 83 and 84), showing this interchange of service messages. It further appears from the testimony of Mockbridge (page 81) and the testimony of Chambers (page 93) that the line between Pothcurno and Penzance was operated jointly by the Western Union Telegraph Company and the Eastern Telegraph Company. It is fair to assume that the messages to go over the lines of the Western Union are taken charge of by that company at Pothcurno; yet in this case that company makes no attempt to trace the message back of Penzance. And while we rely upon the presumption of law hereinbefore discussed, without such reliance the recovery in this case could be sustained by the testimony of these witnesses alone.

IV.

The position taken in the brief of plaintiff in error that Mr. Baker's failure to register a cable address constituted contributory negligence on his part is utterly untenable when viewed in the light of the facts in this case. The delay in delivery and the consequent damage resulted wholly from the change of address in transmission. When the office in Seattle discovered that the correct address was Baker they made an immediate delivery. It is difficult for the ordinary mind to comprehend how registration of an address would in any way conduce to the correct transmission of a message. It is only intended to be in aid of prompt delivery after a message has been correctly transmitted.

V.

Plaintiff in error claims that the court erred in charg-

ing the jury that there was a presumption that the message was started right. It appears from the evidence that a message properly written and addressed was deposited in a telegraph office at Sydney. We do not think there is any error in presuming that in such case the operator there did his duty and "started the message right," especially in view of the fact that when the Penzance office asked the Pothcurno office concerning this message the latter office responded that the message it had sent was addressed to Baker.

VI.

Referring to the portion of the charge complained of in the eighth paragraph of the brief of plaintiff in error, we submit that this portion of the charge taken in connection with the context was as favorable as the company had a right to expect. (See page 141 Record.) The effect of the court's charge on this question is that had the telegram been intended for Barker the delivery to Mr. Mackintosh would have been sufficient.

VII.

Referring to the claim of error made in the ninth paragraph of the brief of plaintiff in error, it is enough to say that we have already pointed out to the court the evidence in the record showing that the mistake was made in the Penzance office.

VIII.

The tenth paragraph of the brief of plaintiff in error is in effect a commendation of the instruction of the court set forth therein.

IX.

The specifications of error made in the eleventh, twelfth and thirteenth paragraphs of the brief of plaintiff in error have been already discussed.

X.

In the fourteenth and fifteenth paragraphs of the brief of plaintiff in error an attempt is made to discuss rulings of the court admitting certain evidence. We cannot conceive upon what theory this matter is discussed, inasmuch as no error was assigned on the ruling of the court in these particulars; the only errors assigned being as to instructions given and refused. It is certainly unnecessary to more than state the proposition that counsel in their brief are limited to the discussion of errors assigned in the assignment of errors. (See Assignment of Errors, Record, pages 168-180.)

XI.

The instruction requested by the defendant and set out in paragraph sixteen of the brief of plaintiff in error was properly refused. Certainly the court would not have been justified in charging the jury that there was nothing on the face of the telegram indicating that it was intended for Mr. Baker; that is to say, upon the face of the telegram as sent. It clearly did indicate that it was intended for Mr. Baker, for as soon as the office at Seattle ascertained that the address was Baker it was immediately delivered to the party for whom it was intended. We again call the court's attention to the fact that the whole delay occurred from the change in address. Nor could the court consistently charge the jury

that this telegram did not indicate on its face the transaction that it referred to. Seattle, and the whole of Puget Sound in fact, is well known to the entire business world as engaging extensively in exporting lumber. Australia is a well known market for lumber. A telegram from Australia to Seattle making an offer of so much per thousand would be understood by any person of ordinary intelligence as an offer for lumber. In any event, this telegram plainly indicated to the defendant that it was an offer to purchase property of some kind. It could reasonably infer that a failure to properly transmit and deliver it would result in the loss of a sale, and necessarily the parties must have contemplated that in case of such loss of sale damages might result. The defendant must have known and must have contemplated that if it failed in its duty to properly transmit and deliver this telegram a sale would be lost, and that in that event they would be liable for the actual loss based upon charges in the value of the property.

The message itself clearly indicates that a sale could be had of certain property; it indicates further that the sale is an advantageous one, as the sender advises acceptance; it also indicates that if the offer is not accepted there will be a loss, for it states that the market is dull and that there is no outlet for the particular product. The telegraph company knew from the terms of the message itself that an advantageous offer would be lost in case the message was not promptly delivered.

The case of *Hadley vs. Baxendale* is not in point, as the damages there claimed were indirect and remote, not direct and consequential.

The facts in *Telegraph Company vs. Hall, 124 U. S.*, are entirely different from those in the case before the court. In that case the plaintiff owned no property. By the message he authorized the purchase of certain property in case the judgment of another person so dictated. *If* such property had been bought and *if* it had been sold on the next day a certain profit would have resulted; but the damages were purely speculative, as it could not be determined whether the property would have been bought or if bought whether it would have been sold on the next day. The discussion in the Hall case on the measure of damages is, however, in point and of interest, and we call attention to the opinion of Justice Mathews, page 456 *et seq.*, and to the cases there cited and reviewed; and we submit that the charge of the circuit judge in the case at bar was directly in line with the law as laid down by Justice Matthews.

But it seems to us that this question is settled by two decisions of this court:

Fleischer vs. Telegraph Co., 55 Fed. 738; affirmed *66 Fed. 899; 14 C. C. A. 166.*

Telegraph Co. vs. Cook, 61 Fed. 624; 9 C. C. A. 624.

In the first of these cases the attorneys for the plaintiff wired attorneys in Seattle, simply requesting the protection of a claim. The message was delayed in transmission. It was shown by evidence that had the Seattle attorneys received the message they would have attached the property of the debtor and would have made the amount of the claim. The court holds the loss resulting from the failure to attach as being within the contemplation of the parties.

In the Cook case the plaintiff instructed his agent, who was engaged in the purchase of fruit for his account at a distance, to buy no more pears. In transmission the word "pears" was changed to "peaches," and the agent continued to buy pears, thus causing the plaintiff a loss. This was also held to be within the reasonable contemplation of the parties.

We submit that there is no error in the record, and that the judgment of the Circuit Court should be affirmed.

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No. 391.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

H. W. BAKER,
Defendant in Error.

Error to the United States Circuit Court for the District of Washington,

NORTHERN DIVISION.

Petition for Rehearing.

GEO. H. FEARONS,
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H. S. CROCKER CO., PRINTERS, S. F.

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Error to the United States Circuit Court for the District of Washington, Northern Division.

PETITION FOR REHEARING BY PLAINTIFF IN ERROR.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The great hardship of this case to our client, the unconscionable advantage given to the defendant in error, the conviction that the principle contained in

Rule 22 has been carried to a greater extent in this case, than in any of the cases cited in the opinion of the Court, or any other case we have been able to find, impels us respectfully to ask this Honorable Court for a rehearing of the case, for the following reasons:

I.

Assuming Rule 22 to be imperative to its fullest extent, no other Court has decided that where the judge *prohibited* counsel from complying with it, that the exceptions were deemed waived. The language in the record is unmistakeable. "This Court refused in all cases to allow exceptions to be taken in the presence of the jury, *and would not have allowed exceptions to be so taken in this case, had it been asked.*" This was one of the rules of the Court, and in all cases the Court refused to obey its own rule, or allow counsel so to do. Counsel knew the fact, how could they prevent the result? If the Court would not allow in this, or in any other case, the rule to be obeyed, by what means, or act, could counsel have compelled the Court to observe its own rule? By insisting upon such observance, they might have been fined, or imprisoned for contempt, but they could not have had their bill of exceptions settled and signed by the Court.

The record shows that the fault was not in the counsel but in the Court itself, and that a client should be mulct in damages solely for the reason that the Court would not obey its own rules, or allow counsel to do so, is evidently unfair and oppressive. In order that this Court can properly say that it will not hear exceptions

taken to the ruling of the Circuit Court, there should be some fault on the part of the litigant, or counsel. In this case no such dereliction of duty appears. The whole trouble was caused by the unyielding refusal of the Court to allow that to be done, that Rule 22 required to be done. The mere statement, without comment, or argument, presents this branch of the case as strongly as we can do it.

II.

It has never been held that the formal bill of exceptions under a similar rule must have been settled and signed by the judge before the jury leaves the box. The doctrine, as we understand it, is that no exception will be considered in the Appellate Court that was not taken at the stage of the trial when the cause for the exception arose.

In *Walton* vs. *U. S.*, *9 Wheaton 651–657*, Mr. Justice Duval said: "It is a settled principle that no bill of "exceptions is valid which is not for matter excepted to "at the trial. We do not mean to say that it is neces- "sary (and, in point of practise, we know it to be other- "wise), that the bill of exceptions should be formally "drawn and signed, before the trial is at an end. It "will be sufficient if the exceptions be taken at the "trial, and noted by the Court, with requisite certainty; " and it may afterwards, during the term, according to "the rules of the Court, be reduced to form and signed "by the judge; and so, in fact, is the general practise."

In *Turner* vs. *Yates*, *16 Howard*, *14–29*, Mr. Justice Curtis, speaking for the Supreme Court, said: "The

"record must show that the exception was taken at that "stage of the trial when its cause arose. The time and " manner of placing the evidence of the exception, for- " mally on the record are matters belonging to the " practice of the Court in which the trial is held. The " convenient dispatch of business, in most cases, does " not allow the preparation and signature of bills of " exception during the progress of the trial."

In *U. S.* vs. *Britling*, *20 How.*, *252*, Mr. Chief Justice Taney said: "The attention of this Court has, upon " several occasions, been called to this subject, and the " rule established by its decision will be found to be this: " The exception must show that it was taken and re- " served by the party at the trial, but it may be drawn " out in form and sealed by the judge afterwards."

In *U. S.* vs. *Carey*, *110 U. S.*, *51*, *52*, *3 sub. ce 424*, Mr. Chief Justice Waite said: "The rule is well es- " tablished and of long standing that an exception to be " of any avail must be taken at the trial. It may be " reduced to form, and signed, afterwards; but the fact " that it was seasonably taken must appear affirmatively " in the record, by a bill of exceptions duly allowed or " otherwise."

In *Phelps* vs. *Mayer*, *15 Ho.*, *160*, Mr. Chief Justice Taney in delivering the opinion of the Court, after stating substantially the same doctrine announced in the cases above referred to, said: "Nor is this a mere " formal or technical provision. It was introduced and " adhered to for purposes of justice. For if it is " brought to the attention of the Court that one of the

" parties excepts to his opinions, he has an opportunity " of reconsidering, or explaining it more fully to the jury " and if the exception is to evidence, the opposite party " might be able to remove it by further testimony if " apprised of it in time."

III.

In this case there were objections to the testimony and to the instructions of the Court made at the time the testimony was given during the progress of the trial and at the time the instruction was given to the jury and before the jury retired to consider their verdict. The first objection we note is found on page 37 of the record and was taken to the testimony of the plaintiff when he was detailing the statements of Mr. Brown, the manager of the defendant at Seattle, as to conversation that took place after the message was delivered. Upon that subject the record is as follows: " Counsel for defendant objects to the witness stating " the declarations of Mr. Brown after the occurrence, " for the reason that the same is irrelevant, immaterial " and incompetent and not binding upon the company. " Which objection is by the Court overruled and an " exception noted for defendant." (Record, page 37).

The second exception was to the testimony of the same witness in regard to his conversation with Michael J. O'Leary, chief clerk of the Cable Message Bureau of the Western Union Telegraph Company in New York. Upon that subject the record is as follows: " Counsel " for defendant objects to the witness relating his con- " versation with Mr. O'Leary, on the ground that the

"same is irrelevant, immaterial and incompetent and "no proper foundation has been laid." Which objection is by the Court overruled and an exception noted for the defendant. (Record, page 38).

It does not require the citation of authorities to show that this ruling was erroneous. After the message had been received by the plaintiff and the transaction closed it is clear that no declaration of an employé of the company could be binding upon the plaintiff herein. The refusal of the Court to exclude the evidence is properly in the bill of exceptions as finally signed by the Court and comes here for review.

The third exception is to the exclusion of the testimony of E. H. Brown, manager of the plaintiff in error at Seattle as to a book of rules and regulations and tariff in use adopted by the International Telegraph Convention, being the rules and regulations controlling the telegraphic service all over the world outside of the United States. The witness recognized the book as a book of rules and regulations and tariff in use and adopted by the International Telegraph Convention, and as containing the rules and regulations on which messages were received, and was proceeding to state to the Court the countries adopting the system and what it contained when Mr. Carr objected to the introduction of the book. The record upon that subject is as follows: "Mr. Carr. We contend that it is not proper or "necessary for him to state what this book contains. "Q. By Mr. Burleigh. Just state whether New South "Wales was a party to that convention. A. Yes, sir. "New South Wales represented by Frances D. Bell.

"Defendant offers in evidence the book identified by "the witness, particularly paragraph 13, pages 17 and "18, in reference to telegraphic messages and addresses, "being the rules and regulations controlling the tele- "graphic service all over the world outside of the "United States, on the theory that a message sent at "Sidney, New South Wales, over the Government lines "was subject to the rules and regulations, and that Mr. "Baker has not any rights superior to the man who "sent the message at that point. Plaintiff objects as "irrelevant, immaterial and incompetent. Objection "sustained. Exception noted for defendant." (Record, 119, 120).

We contend that a book of rules and regulations adopted by an international telegraph convention and acted upon by all the telegraph companies outside of the United States, including New South Wales, and in accordance with which cable messages were received, transmitted and delivered throughout the telegraph world outside of the United States, was material and proper to be received in evidence, not indeed that the Court would be bound to take such rules and regulations as an absolute guide in telegraphic business, but to enable the Court to see whether the rules adopted by that convention, contained in that book and acted on by telegraph companies were reasonable and just; and that the exclusion of the testimony was error.

On page 136 of the record it was said: "The Court "directs your attention to the testimony given by the "depositions of Michael J. O'Leary and G. R. Mock- "ridge and Edward Chambers, and instructs you that

" neither one of said witnesses are shown to be compe-
" tent to testify as to the manner in which the tele-
" graphic message in question was transmitted over the
" wire between any points or received at any point on
" its route. These witnesses do testify to facts which
" are proper to be considered in this case bearing on
" the question as to whether the message was properly
" received, or properly delivered I should say, to this
" company.

" They show what was on file at the different offices,
" at Penzance and New York, but the point of this
" instruction is that they are not good witnesses to
" prove the condition in which the message came to the
" office at Penzance; they are giving, not the best evi-
" dence, but secondary evidence. They can only testify
" as to what some other person has placed in the records
" in their office, or has said about the matter; and the
" law requires that the witness should give his testi-
" mony under oath, the same as other witnesses, in
" order to make it of the same character and degree of
" credibility and reliability as the other testimony in
" the case. Because they are repeating to us here
" unsworn testimony is why I instruct you their testi-
" mony is not good to prove the fact in the case as to
" the condition of the message when transmitted from
" Porthcurno to Penzance."

On the same day this charge was given to the jury and after it was given, and while the jury were still in the box, the following occurred in Court as shown by the record: " Mr. Burleigh. Before the jury retires there
" is one point I want to suggest to your mind. I ask

" the Court to further instruct the jury on the point
" that is suggested by an instruction requested by the
" plaintiff, and which I did not notice until the Court
' read it. The Court instructed the jury and ex-
" plained to the jury the competency and legal effect of
" the evidence of Mockridge and Chambers superin-
" tendent and manager of the Western Union Tele-
" graph Company at Penzance, the effect of which in-
" struction was that they were not competent to testify
" to the telegram as it came to the Penzance office, or at
" least that it was not shown that they were competent.
" I would like to have your Honor instruct the jury
" that they were competent to testify to the originality
" of the paper which attached to their depositions as the
" copy made at the time of the receipt of the original
" telegram as it existed in that office and that telegram
" made at the time is the best evidence of the contents
" of the telegram received at that office obtainable; in
" other words, that this telegram which is attached to
" this deposition being identified as the original copy
" in the Penzance office made at the time of the receipt
" of the telegram is the best evidence of the contents of
" the telegram received there.

" THE COURT: I think you are going a little too
" far in what you claim there, Mr. Burleigh, about its
" being the best evidence of the telegram actually re-
" ceived there. According to the testimony the tele-
" gram received at Penzance came by sound, and the
" very best evidence of what was received in the office
" at Penzance would be the testimony of the person
" who heard the sounds and recorded them. I do not

" know how far our statute may have made a telegram " after it is transcribed legal evidence, but I do not " think it would apply to a case of this kind or dispense " with the proof as to what was transmitted by sound to " that office.

" I want the jury to understand by what I have said " that the testimony of these witnesses who have given " their depositions here, Mr. Chambers and Mr. Mock- " ridge, is the best evidence obtainable as to what the " files in the office at Penzance show was received as the " message, and it is competent for that purpose, as I " have said, that it is competent to be considered as " bearing on the question, but is not the best evi- " dence as to how the message was transmitted from " Porthcurno." (Rec. 145, 146, 147.)

After this instruction was given to the jury counsel for the defendant requested the Court to instruct the jury as follows: " I would like to have your Honor " instruct the jury that Mockridge and Chambers, " superintendent and manager respectively, of the " Western Union Telegraph Company at Penzance, " were competent to testify to the originality of the " paper which is attached to their deposition as the copy " made at the time of the receipt of the original tele- " gram as it existed in that office and that that tele- " gram made at the time is the best evidence of the " contents of the telegram received at that office obtain- " able; in other words, that this telegram which is " attached to this deposition, being identified as the " original copy in the Penzance office, made at the time " of the receipt of the telegram is the best evidence of " the contents of the telegram as received there.

" Which instruction was refused by the Court and to " the refusal of the Court to give such instruction, the " defendant then and there excepted." (Rec. 160, 161.)

We have quoted thus fully from the record to show that this exception was within the rule as stated by Mr. Chief Justice Taney in *Phelps* vs. *Mayer*, *supra*. This precise question of the character of the evidence of Mockridge and Chambers was brought distinctly before the Court, giving the Court a full opportunity after it had charged the jury upon that point, of reconsidering his opinion upon that subject. The Court was in full possession of the views of the counsel for the defense, knew precisely what the testimony was and could have been in no way misled upon the subject. The Court also knew that Mockridge had testified as follows: "A. " I produce the said original message delivered by the " Eastern Telegraph Company to the Western Tele- " graph Company on October 1, 1891, and it is annexed " to this deposition and marked Exhibit A." (Record pages 81, 82.)

The Court also knew that in answer to the following question, " Was any message received by the Western " Union Telegraph Company on October 1, 1891, at " Penzance, from Sidney, Australia, addressed to " Baker, Seattle, and reading: 'Offered four pounds thou- " 'sand cif advise accept market dull no outlet,'" the witness Mockridge answered " No." (Record, page 83.)

The Court also knew that in answer to a question the witness Mockridge had said: " We did transmit the " message as it was received. I admit that we did

" transmit the message. The message was transmitted " from the Western Union Telegraph Company's office " for which I am acting, as follows: 'Barker, Seattle, " 'offered four pounds thousand cif advise accept market " 'dull no outlet.'"

The Court also knew that the only testimony concerning the reception at Penzance and the transmission of the message was contained in the depositions of Mockridge and Chambers, and that in those depositions there was not a scintilla of evidence that any person except Mockridge had anything to do with receiving or transmitting the message. The depositions were before the Court and especially called to its attention after the Court made the charge and while the jury was present, and instead of modifying or reconsidering its charge, he reaffirmed it and injected into the evidence an imaginary operator that he insisted was the only competent witness to prove the reception and transmission of the message.

We submit that this was error and that the counsel properly brought the matter before the Court and that this exception was taken in due time.

IV.

Section 914 of the Revised Statutes of the United States provides that "The practise, pleadings, and " forms and modes of proceeding in civil causes, other " than equity and admiralty causes, in the Circuit and " District Courts, shall conform, as near as may be, to " the practice, pleadings, and forms and modes of pro- " ceeding existing at the time in like causes in the

"courts of record of the State within which such Cir-
"cuit or District Court are held, any rule of Court to
"the contrary notwithstanding."

"Exception to charge to jury. Exceptions to a charge
"to a jury, or a refusal to give as a part of such charge
"instructions requested in writing, may be taken by
"any party by stating to the Court, after the jury shall
"have retired to consider their verdict, and, if practic-
"able, before the verdict has been returned, that such
"party excepts to the same, specifying, by numbers of
"paragraphs or otherwise the parts of the charge
"excepted to, and the requested instructions the refusal
"to give which is excepted to, whereupon the Judge
"shall note the exceptions in the minutes of the trial,
"or cause the stenographer (if one is in attendance) so
"to note the same."

Laws of Washington, 1893, page 112, paragraph 4.

"Exceptions to any ruling upon an objection to the
"admission of evidence offered in the Court of trial or
"hearing need not be formally taken, but the question
"put, or rather offer of evidence, together with the objec-
"tion thereto and the ruling thereon, shall be entered
"by the Court, Judge, referee or commissioner (or by
"the stenographer, if one is in attendance) in the minutes
"of the trial or hearing, and such entry shall import an
"exception by the party against whom the ruling is
"made."

Laws of Washington, 1893, page 112, paragraph 5.

The statutes last-above quoted were in full force at the time of the trial of this cause in the Circuit Court.

In Sears vs. Eastburn, 10 How., 186, Mr. Chief Justice Taney, speaking for the Court, said: "The act of "May, 1828 (4 Stat. at L., 278), in express terms, "directs that the forms and modes of proceeding in the "courts of the United States, in suits at common law "in the States admitted into the Union since 1789, "shall be the same with those of the highest court of "original jurisdiction in the State. Alabama is one of "the States admitted since 1789; and the act of Con-"gress, therefore, makes it obligatory upon the courts "of the United States to conform in their mode of pro-"ceeding to the law of the State. The law of the "State itself, undoubtedly, was not obligatory upon "the courts of the United States, but it is made so by "the act of Congress."

See, also, to the same effect:

Perkins vs. Watertown, 5 Biss., 320.
Lewis vs. Gould, 13 Blatch., 216.
Weed Sew. Machine Co. vs. Wicks, 3 Dill., 261.
Thomson vs. R. R. Companies, 6 Wall., 134.

In the trial of this cause the Court had an official stenographer, whose duty it was to take down all the proceedings, including objections to the admission of testimony, and hence there was no necessity for any memorandum in writing to be handed to the Judge upon any point ruled in the cause.

We submit that the rule invoked by this Court, in the language of Chief Justice Taney, was introduced

and is adhered to for purposes of justice. That there were sufficient objections taken within the rule to authorize this Court to consider the cause upon its merits.

We submit further, that this Court is bound by the act of Congress *supra*, any rule of the Court to the contrary notwithstanding.

In this case the plaintiff himself proved conclusively upon the stand that it was a stale claim, had no merit in law or morals, was a mere wrecking expedition against the funds of the defendant. Is it possible in such a case, where numerous errors have been assigned, three of them at least, well taken, and one going to the very gist of the case, that this Honorable Court will say, because the Court committed the gravest of all errors in refusing a compliance with its own rules, that the plaintiff in error cannot be heard, and that in the face of an imperative law of the Congress of the United States.

We respectfully ask for a rehearing in this case and upon such rehearing that the judgment be reversed and a new trial ordered, when all the facts in the case can be brought out, and the plaintiff in error have an opportunity to make its defense and take proper exceptions to the rulings of the Court if necessary.

Respectfully submitted,

GEORGE H. FEARONS,
RICHARD B. CARPENTER,
Attorneys for plaintiff in error.

We hereby certify that the foregoing petition is not filed for delay, but to secure justice, and that said petition is, in our opinion, well founded in point of law.

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RICHARD B. CARPENTER,
Attorneys for plaintiff in error.